Supreme Court, U.S.
FILED

961198 JAN 28 1997

OFFICE OF THE CLERK

No. 94-2875

In The

Supreme Court of the United States

October Term, 1996

PETER FOLTICE,

Petitioner,

v.

GUARDSMAN PRODUCTS, INC., BARGAINING EMPLOYEES' RETIREMENT INCOME PLAN, and GUARDSMAN PRODUCTS, INC., a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK S. ALLARD (P38164)
Counsel of Record
MARY C. BONNEMA (P48789)
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Counsel for Petitioner
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

93PP

QUESTIONS PRESENTED

1. WHETHER THE ATTORNEY FEE PROVISION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, 29 USC § 1132(g)(1), REQUIRES A PRESUMPTION OF AN AWARD OF ATTORNEY FEES FOR A PLAINTIFF WHO IS FORCED TO FILE LITIGATION TO SECURE HIS BENEFITS PURSUANT TO A PENSION PLAN, AND IS AWARDED EVERY PORTION OF DAMAGES SOUGHT, INCLUDING COSTS, AND PREJUDGMENT INTEREST, BASED ON A FINDING THAT THE DENIAL OF THE PENSION BENEFIT WAS "DOWNRIGHT UNREASONABLE?"

2. WHETHER, UNDER A BALANCING TEST FOR THE AWARD OF ATTORNEY FEES, IF THIS COURT DETERMINES THAT THERE IS NOT A PRESUMPTION OF ATTORNEY FEES UNDER ERISA, AN AWARD OF ATTORNEY FEES IS JUSTIFIED WHEN THE ERISA PENSION PLAN MADE BLATANT MISREPRESENTATIONS REGARDING PRIOR INTERPRETATIONS OF THE PLAN LANGUAGE BEFORE THE INITIATION OF THE LITIGATION, WHICH FORCED PLAINTIFF TO PURSUE LITIGATION TO SECURE HIS EARNED BENEFITS?

PARTIES TO THE PROCEEDINGS

Petitioner, Peter Foltice was Plaintiff in the District Court and Appellant in the Court of Appeals for the Sixth Circuit. Defendants, Guardsman Products, Inc., Bargaining Employees' Retirement Income Plan, and Guardsman Products, Inc., were the Defendants in the District Court and Appellees in the Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 13

I. THE CONFLICT IN THE CIRCUITS 13

II. THE CONFLICT WITH THIS COURT'S PRECEDENT 19

III. THE NATIONAL IMPORTANCE OF THIS CASE 20

CONCLUSION 25

APPENDIX

OPINION AND DISSENT, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 1a

ORDER CONCERNING ATTORNEY FEES, PREJUDGMENT INTEREST AND COSTS 27a

TRANSCRIPT OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN 32a

STIPULATED FACTS 43a

CONTINGENT FEE AGREEMENT 59a

TABLE OF AUTHORITIES

Page

CASES

Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 17, 18, 19, 22

Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820 (7th Cir. 1984) 16

Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220 (1st Cir. 1996) 16

Edwards v. State Farm Mutual Automobile Insurance Co., 851 F.2d 134 (6th Cir. 1988) 24

Egert v. Connecticut General Life Insurance Co., 768 F. Supp. 216 (N.D. Ill. 1991) 23

Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield, 41 F.3d 1476 (11th Cir. 1995), *cert denied*, ___ U.S. ___, 115 S. Ct. 2002, 131 L.Ed.2d 1003 (1995) 16

Groves v. Modified Retirement Plan, 803 F.2d 109 (3d Cir. 1989) 18

Hollenbeck v. Falstaff Brewing Corp., 605 F. Supp. 421 (E.D.Miss. 1984), *aff'd*, 780 F.2d 20 (8th Cir. 1985) 14

Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995), *cert denied*, ___ U.S. ___, 116 S. Ct. 301, 133 L.Ed.2d 206 (1995) 15

Landro v. Glendenning Motorways, 625 F.2d 1344 (8th Cir. 1980) 14

Losada v. Golden Gate Disposal Co., 950 F.2d 1395 (9th Cir. 1991) 15

Lutheran Medical Center of Nebraska v. Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan, 25 F.3d 616 (8th Cir. 1994) 14

TABLE OF AUTHORITIES – Continued

Page

McPherson v. Employees' Pension Plan of American Re-Insurance Co. Inc., 33 F.3d 253 (3d Cir. 1994) 16

Meredith v. Navistar Int'l Transp. Corp., 935 F.2d 124 (7th Cir. 1991) 16, 18

Miele v. New York State Teamsters Plan, 831 F.2d 407 (2d Cir. 1987) 18

Mills v. Electric Auto-Lite Company, 396 U.S. 375, 90 S. Ct. 616, 24 L.Ed.2d 593 (1970) 19, 20

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S. Ct. 964, 19 L.Ed.2d 1263 (1968) 15

Quesinberry v. Life Insurance Company of North America, 987 F.2d 1017 (4th Cir. 1993) 14

Reinking v. Philadelphia American Life Insurance Co., 910 F.2d 1210 (4th Cir. 1990) 14

Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692 (7th Cir. 1991) 16

Rodriguez v. MEBA Pension Trust, 956 F.2d 468 (4th Cir. 1992) 14

Secretary of Department of Labor v. King, 775 F.2d. 666 (6th Cir. 1985) .... *passim*

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984) 15

Stanton v. Larry Fowler Trucking, Inc., 52 F.3d 723 (8th Cir. 1995) 14

TABLE OF AUTHORITIES – Continued

Page

OTHER

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 3
29 U.S.C. § 1132(g)(1) 2
42 U.S.C. § 2000a-3(b) 15

PETITION FOR A WRIT OF CERTIORARI

Peter Foltice, an individual, petitions this Court for a Writ of Certiorari to review the Judgment of the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the panel of the Court of Appeals for the Sixth Circuit (Circuit Judges Nelson and Siler, and District Judge Wiseman, sitting by designation) are reported at 98 F.3d. 933 (6th Cir. 1996), and are reprinted in the Appendix to this Petition ("App.") at 1a. The Opinion of the District Court (Judge McKeague) granting all costs, and prejudgment interest, but refusing an award of attorney fees, is not reported, and is reprinted at App. 27a. The transcript opinion of the District Court granting Judgment to Petitioner on his pension claim is unreported, and is reprinted at App. 32a.

JURISDICTION

The Judgment of the Court of the Appeals for the Sixth Circuit was entered on October 30, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(g)(1) of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1132(g)(1), provides as follows:

> In any action under this title by a participant, beneficiary, or fiduciary, the Court in its discretion may allow a reasonable attorneys' fee and costs of action to either party.

STATEMENT OF THE CASE

Peter Foltice, 75, was absolutely entitled to receive his pension benefits from Guardsman Products, Inc.'s Bargaining Employees' Retirement Income Plan ("Guardsman Products"). Guardsman Products, with advice of counsel, engaged in charades to prevent payment of that pension to Mr. Foltice, even though the Plan language clearly required that payment. Mr. Foltice was forced to retain counsel, and pursue litigation, in order to secure the benefits to which he was rightfully entitled. After securing a judgment that awarded Mr. Foltice every requested measure of damages, the District Court refused to award attorney fees.

Fortunately, Mr. Foltice engaged a law firm that was willing to take the claim without economic detriment to him. Mr. Foltice's counsel, Varnum, Riddering, Schmidt & Howlett LLP, agreed to pursue this claim on a unique Contingent Fee Agreement (App. 59a). Under this Contingent Fee Agreement, Varnum, Riddering, Schmidt & Howlett LLP, would take only the attorney fees awarded

by the Court, pursuant to ERISA, as compensation for representing Mr. Foltice in this matter.

The case was tried on Stipulated Facts. In those Stipulated Facts, Guardsman Products admitted that the representations that it made to Mr. Foltice before he retained Varnum, Riddering, Schmidt & Howlett LLP, were not supported by any evidence. The United States District Court for the Western District of Michigan awarded to Mr. Foltice every possible award of damages, including his full pension (App. 32a-42a), costs (App. 31a), and prejudgment interest (App. 30a-31a). The Jurisdiction of the District Court was based on federal question jurisdiction, 28 U.S.C. § 1331.

The request for attorney fees for Mr. Foltice, however, was denied (App. 31a). Under any of the various standards adopted by the Circuit Courts of Appeals, Mr. Foltice's counsel was entitled to an award of attorney fees.

This case presents this Court with the opportunity to resolve a split in the Circuit Courts of Appeals, and to establish the appropriate standard for payment of attorney fees under ERISA when a participant is forced to litigate to secure a benefit to which that participant is clearly entitled. The only issue on this appeal is the request for attorney fees. Guardsman Products has not appealed the underlying determination that it was responsible to pay Mr. Foltice his pension, plus interest and costs. This case provides the opportunity to decide the appropriate standard for payment of attorney fees under ERISA, without dealing with issues raised on the merits, and while doing so on Stipulated Facts.

Peter Foltice was a long-time employee of Guardsman Products. (Stipulated Facts, ¶¶ 3 and 4, App. 44a). After working for thirty years, on January 19, 1976, Mr. Foltice suffered a severe knee injury at work which has prevented him from returning to work. (Stipulated Facts, ¶¶ 3, 4, and 5, App. 44a). Since January 19, 1976, Mr. Foltice has received Workers' Disability Compensation Benefits due to this injury. (Stipulated Facts ¶ 5, App. 44a).

An individual who is seventy years, six months old, is automatically entitled to receive pension benefits, even if they continue to be employed. (Stipulated Facts, ¶ 24, App. 48a). Guardsman Products did not, however, inform Mr. Foltice that he was eligible to apply for his pension benefits when he attained the age of 70 years, six months. (Stipulated Facts ¶ 8, App. 45a). Though Guardsman Products did not inform Mr. Foltice that he was entitled to apply for his benefits, Mr. Foltice determined, on his own, that he was eligible to seek his retirement benefits, and applied for those benefits, on November 11, 1992. (Stipulated Facts ¶ 12, App. 45a).

Upon receiving Mr. Foltice's Benefit Election Form, Guardsman refused to pay Mr. Foltice's pension benefit. (Stipulated Facts ¶¶ 15 and 16, App. 46a). Guardsman Products refused to pay Mr. Foltice's pension benefit because he was receiving worker's compensation payments. (*Id.*).

Guardsman Products took the position that the Plan required an offset of pension benefits against workers' disability compensation benefits. (*Id.*) The Plan language

that Guardsman relied upon did not utilize the term "Workers' Compensation Benefits," but merely stated:

> With respect to any month for which the Participant is receiving accident or sickness benefits under any plan to which the Company has contributed, but with pro-rata benefits with respect to any month for which the Participant receives sickness and accident benefits for part of the month. (Stipulated Facts ¶ 21, App. 48a).

Guardsman Products took the position that "accident or sickness benefits" included "Workers' Disability Compensation Benefits," even though, in at least eight other locations in the Plan, Guardsman Products utilized the words "Workers' Compensation Benefits" when they were referring to Workers' Compensation Benefit issues. (Stipulated Facts ¶¶ 22 and 23, App. 48a).

Guardsman Products supported this position by relying upon paragraph 10 of the Summary Plan Description. The Summary Plan Description had language that conflicted with the Plan document as to this issue. (Stipulated Facts ¶¶ 25, 26 and 27 App. 49a-50a). Guardsman Products also stipulated that the Summary Plan Description contained the following language:

> IN THE EVENT OF ANY CONFLICT BETWEEN THIS BOOKLET AND THE PLAN DOCUMENTS, THE PLAN DOCUMENTS WILL GOVERN.

(Stipulated Facts ¶ 26, App. 50a) (capitalization in original). Guardsman Products conceded, therefore, that their own Summary Plan Description did not support their theory.

With this knowledge, Guardsman Products continued to deny Mr. Foltice his pension benefits. When Mr. Foltice, through his Workers' Disability Compensation attorney, continued to push this issue, Guardsman retained Warner, Norcross & Judd, its corporate counsel, to assist in this matter. Two attorneys from Warner, Norcross & Judd, Vern Saper and William McKee, both wrote letters to Mr. Foltice, through his Workers' Disability Compensation attorney. Both informed Mr. Foltice that this language had been interpreted in the past to include Workers' Disability Compensation payments in the Plan language "sickness or accident benefit." (Stipulated Facts ¶¶ 32 and 42, App. 51a-52a and 54a). Through the course of discovery in this litigation, however, Guardsman Products could not produce any proofs at all that this language had ever been interpreted in the past, and there are no minutes reflecting that the Pension Committee of the Guardsman Products' Plan had ever met to review Peter Foltice's claim, or ever interpreted this language in the past. (Stipulated Facts ¶¶ 33, 34, 48 and 49, App. 52a and 56a-57a).

Not only were Guardsman Products and their counsel misrepresenting that prior "interpretations" of the plan language had occurred, they were also making, "thinly veiled threat[s]," and sending these "thinly veiled threat[s]" at Christmastime, "when its impact could be most keenly felt[.]" (App. 18a-19a). On December 22, 1992, William McKee, of Warner, Norcross & Judd, wrote a letter that contained the following language:

> Recognizing that you and your client want the Plan interpreted differently, I suspect that you will be tempted to rush off and file suit upon

> receipt of this letter. Before you do so, however, consider the following: Under the Plan in question, Guardsman is vested with discretionary authority to determine eligibility and to construe the terms of the plan documents. This is significant, because it allows Guardsman a reasonable degree of leeway in how it interprets the Plan. The issue is not whether your client's interpretation of the plan is reasonable or whether there is a more reasonable interpretation of the plan. Under the controlling authority of the United States Supreme Court, the issue is whether Guardsman's interpretation of the Plan is so unreasonable as to constitute an abuse of its discretion. We continue to believe that there has been no abuse of Guardsman's discretion and that its interpretation of the plan is fair, reasonable, and legally justifiable.

(Stipulated Facts ¶ 42, App. 54a).

The United States District Court for the Western District of Michigan disagreed with Mr. McKee's interpretation. The Court found that the interpretation by Guardsman was so unreasonable as to constitute an abuse of discretion. The Court found that Guardsman Products' construction "defies the plan's plain language." (App. 36a). The trial court expressly found that the denial of Mr. Foltice's pension claim was not based upon an interpretation of the Plan, but was an "addition to or modification of unambiguous plain language." (App. 38a). The Trial Court further held that the Pension Committee of the Plan was not vested with authority to add to or modify the Plan's language, and the Court found this action to be "ultra vires," and the denial of Peter Foltice's pension claim was "downright unreasonable." (App. 38a). Finally,

the Trial Court found that Guardsman Products had abused its discretion in its decision to deny Peter Foltice his pension claim, and this denial "must be reversed even under the differential [sic] arbitrary and capricious standard of review." (App. 38a).

The Trial Court also had "grave reservations" as to whether Guardsman Products had, in fact, actually ever reviewed Mr. Foltice's claim. (App. 39a). If no decision had been made by the Pension Committee, then the Court would have had no decision to which it could defer. (*Id.*) The Stipulated Facts establish that no minutes of any such meeting were ever produced by Guardsman Products. (Stipulated Facts, ¶ 48, App. 56a; App. 39a-40a).

The District Court also decided, in the alternative, that the matter should really be reviewed under the *de novo* standard of review. The Court found that Guardsman Products' claim that it was merely "interpreting" the Plan language was "suspect at best." (App. 39a). The Trial Court correctly held that a Court must review the decision to deny pension benefits *de novo*, unless the denial is based upon discretionary authority granted pursuant to the Plan document. (App. 38a-39a). Since the Court found the Plan language to be plain and unambiguous (App. 38a-39a), adding to or modifying the plain language to include Workers' Compensation Payments represented "the exercise of discretionary authority that is not conferred to the Pension Committee and is a decision subject to *de novo* review." (App. 39a). Since the Court found that the plain, unambiguous language of the Plan supported the payment of Mr. Foltice's pension claim, the decision not to pay Mr. Foltice his pension could not be sustained on a *de novo* review, either.

> Accordingly, applying the *de novo* standard of review, the Court also concludes that the pension committee's decision is not only invalid as ultra vires but also clearly erroneous in substance, contravening standard rules of contract interpretation, and must be reversed. (App. 40a).

The Trial Court found no support for any of the actions taken by Guardsman Products. (App. 40a).

On July 28, 1994, the Honorable David W. McKeague entered a Judgment for past due pension benefits in the amount of $20,827.04, ordering the payment of post-judgment interest and granting a declaratory judgment for future pension benefits in the amount of $452.00 per month to Peter Foltice, and, upon Mr. Foltice's death, $226.00 per month for Mr. Foltice's wife, if she survives Mr. Foltice. Guardsman Products has not appealed any part of the substantive decision by Judge McKeague as it relates to the requirement to pay Mr. Foltice his pension benefits.

On August 11, 1994, Mr. Foltice filed a Motion and Brief for award of pre-judgment interest, costs and attorney fees. On October 26, 1994, the Honorable David W. McKeague entered an order granting Plaintiff's Motion for award of pre-judgment interest in the amount of $2,559.64, and for all costs requested by Plaintiff. (App. 31a). The Court, however, denied Plaintiff's request for any attorney fees. (App. 31a).

The Trial Court applied the five part balancing test utilized by the Sixth Circuit in *Secretary of Department of Labor v. King*, 775 F.2d. 666, 669 (6th Cir. 1985). (App. 28a). The Court summarized the *King* standards as follows:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

(App. 28a).

The District Court ruled that the Defendants "did not evidence a degree of culpability approaching bad faith." (App. 29a). The first *King* factor is not, however, simply bad faith. The Court, in essence, condensed the degree of culpability to the level of bad faith, only.

The Trial Court conceded that the second *King* factor, as to the ability to pay reasonable attorney fees, was certainly favorable to an award of fees. (App. 29a). The Court then held, however, that the third *King* factor, relating to deterrent effect, did not weigh in favor of an award of attorney fees. (App. 29a).

As to the fourth *King* factor, the Court acknowledged, and both parties agreed, that this result would have an incidental benefit to four other similarly situated employees of Guardsman Products. (App. 29a). This did not, however, convince the District Court that this litigation would confer a benefit upon other parties similarly situated. (App. 29a). Finally, the Trial Court recognized that the relative merits of Guardsman Products position certainly weighed in favor of an award of attorney fees. The Court found, however, that this factor, along with the

second factor, were not sufficient to warrant an award of attorney fees.

Mr. Foltice then filed an appeal to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit Court of Appeals, in a two-one split decision, affirmed the denial of attorney fees. The majority opinion concurred with the Trial Court's decision but, interestingly, determined that the fifth factor, based on the "relative merits of the parties' positions," may have weighed in favor of Guardsman Products, rather than Mr. Foltice. (App. 11a-12a). The majority opinion held that the language of the Summary Plan Description controlled, even though the Summary Plan Description specifically stated that if there were a conflict between the Summary Plan Description and the Plan document, the Plan document would control. (App. 12a).

Based upon this finding of the fifth *King* factor, the two judges in the majority in the Sixth Circuit held that both the fifth factor, and the first factor, ("the degree of the opposing party's culpability or bad faith") favored Guardsman Products, and not Mr. Foltice. (App. 9a, 11a-12a). The majority opinion of the Sixth Circuit Court of Appeals effectively condensed the first *King* factor, therefore, not to a showing of culpability **or** bad faith, but simply bad faith, and held that "there was no bad faith here." (App. 9a).

Judge Wiseman, the author of the dissenting opinion, in the Sixth Circuit, would have awarded attorney fees. Judge Wiseman noted that the majority opinion "sets bad precedent by collapsing 'bad faith or culpability' into a single test." (App. 19a). The dissenting opinion found

that the arbitrary denial of Mr. Foltice's claim was "inherently a finding of culpability." (App. 17a). Judge Wiseman went on to note that the Trial Court found that the denial was "downright unreasonable" and "an abuse of discretion, based on an illegitimate interpretation of plan language." (App. 17a) (footnote omitted). Additionally, the dissent noted that Guardsman's attempt to dissuade Mr. Foltice from pursuing his pension claim by making misrepresentations regarding prior interpretations was "inaccurate, misrepresentative, and, as such, evidence of defendants' culpability." (App. 18a). These misrepresentations, along with sending "thinly veiled threat[s]" at Christmastime in 1992, also evidenced bad faith. (App. 18a-19a).

Judge Wiseman also found that there would have been a deterrent effect if attorney's fees were awarded (App. 21a) and that Mr. Foltice's case had, in fact, conferred a common benefit on other members of the Plan. (App. 21a-23a). Judge Wiseman also found that the relative merits of the parties' positions, the fifth *King* factor, would certainly weigh in Mr. Foltice's favor, as the majority opinion misapplied existing Sixth Circuit precedent. (App. 25a-26a).

In this context, based upon Stipulated Facts, this matter is now presented to the United States Supreme Court. This case satisfies all three of the significant reasons for granting a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents all three of the most important grounds for granting review by this Court: (1) the decision below has further created a direct conflict in the Circuits; (2) the decision is in conflict with this Court's own precedent; and (3) the case plainly presents significant issues of nationwide importance. Together, these grounds present a compelling case for certiorari.

I. The Conflict in the Circuits.

The Circuit Courts of Appeal are irreconcilably conflicted on the issue of whether a presumption exists in favor of awarding attorney's fees to prevailing parties under ERISA. The conflict is a three-way split among the Circuits. Some Circuits apply the traditional five-factor analysis. Generally, that five-factor test includes an analysis in an ERISA case of: (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on other participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions. *See, e.g., Secretary of Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). Other Circuits apply the five-factor balancing test in tandem with a presumption in favor of prevailing beneficiaries. Still other Circuits apply, at different times, either one, or both, of these approaches.

To date, the Eighth and Ninth Circuits[1] plainly mandate a presumption favoring an award of attorneys' fees to prevailing beneficiaries litigating claims under ERISA. As noted above, these Circuits generally couple such a presumption along with the traditional balancing factors ordinarily applied in attorney fee cases.

The Eighth Circuit Court of Appeals has expressly ruled in *Lutheran Medical Center of Nebraska v. Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan*, 25 F.3d 616 (8th Cir. 1994), that "a plan beneficiary who succeeds in an action to enforce rights under a plan should recover attorneys' fees unless 'special circumstances' would render such an award unjust." The Eighth Circuit has a long history of a presumptive award of attorneys' fees under ERISA. *Stanton v. Larry Fowler Trucking, Inc.*, 52 F.3d 723 (8th Cir. 1995); *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421, 437 (E.D.Miss. 1984), *aff'd*, 780 F.2d 20 (8th Cir. 1985);[2] *Landro v. Glendenning Motorways*, 625 F.2d 1344, 1356 (8th Cir. 1980).

---

[1] The Fourth Circuit has routinely struggled with the presumption issue. For example, the Fourth Circuit recognized in *Rodriguez v. MEBA Pension Trust*, 956 F.2d 468, 471 (4th Cir. 1992) (vacated as moot upon settlement), in relying on its earlier precedent in *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d 1210, 1218 (4th Cir. 1990), that a presumption favoring ERISA plaintiffs was mandated. A subsequent panel of the Fourth Circuit overruled this holding and reverted back to a strict balancing test. *Quesinberry v. Life Insurance Company of North America*, 987 F.2d 1017, 1024 (4th Cir. 1993).

[2] In *Hollenbeck*, the Eighth Circuit Court of Appeals ruled:

> Section 1132(g), like the rest of ERISA, is remedial legislation. The Section should therefore be read broadly to mean that a plan participant or beneficiary

Similarly, the Ninth Circuit also applies a presumption in favor of awarding attorney's fees to prevailing plan participants. For example, in *Losada v. Golden Gate Disposal Co.*, 950 F.2d 1395 (9th Cir. 1991), the Ninth Circuit ruled that a successful employee who litigated a pension claim when a plan administrator reduced his monthly benefits under the state worker's compensation laws was entitled to attorney fees. In so holding, the Ninth Circuit relied on the seasoned precedent of *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984), in which the Ninth Circuit held:

> As a general rule, ERISA employee plaintiffs should be entitled to a reasonable attorney's fee if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing the suit.

See also, Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1468 (9th Cir. 1995), *cert denied*, 116 S. Ct. 301, 133 L.Ed.2d 206 (1995) (award of attorney fees should ordinarily be granted to plaintiffs in ERISA litigation).

In contrast to the "presumption-plus-balancing" test the aforementioned Circuits routinely apply,[3] the Seventh

---

> if he prevails in his suit under § 1132 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 437.

[3] Importantly, under the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), which is similar remedial legislation that identically provides for attorney fees, this Court has applied a presumptive test for attorney fees such that attorney fees should be awarded to prevailing plaintiffs "unless special circumstances would render such an award unjust." *Newman v.*

Circuit has applied a hybrid of tests. As the Seventh Circuit Court of Appeals acknowledged in *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991), it follows either the presumptive approach (prevailing parties should recover attorney's fees unless special circumstances make an award unjust), the five-factor balancing test, or both. *Id. See, Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 828-29 (7th Cir. 1984); *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 697-98 (7th Cir. 1991). Thus, not only does a clear conflict on this issue exist *among* the Circuits, a conflict even exists *within* some Circuits.

The Sixth Circuit, along with various other Circuits,[4] has adopted yet a third test – the strict balancing test. The Sixth Circuit has refused to adopt the presumption of an award of attorney's fees for individual beneficiaries who successfully litigate their claims under 29 U.S.C. § 1132(g), despite the direct conflict caused by its precedent in comparison with its sister jurisdictions. In fact, the Majority Opinion in this case pointed out that the Sixth Circuit "recognizes no presumption as to whether attorney fees will be awarded" and the Sixth Circuit has

---

Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

[4] The First, Third and Eleventh Circuits have likewise declined to presumptively award attorney fees to prevailing plaintiffs in ERISA litigation. *See, Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220 (1st Cir. 1996); *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield*, 41 F.3d 1476 (11th Cir. 1995), *cert denied*, ___ U.S. ___, 115 S. Ct. 2002, 131 L.Ed.2d 1003 (1995); *McPherson v. Employees' Pension Plan of American Re-Insurance Co. Inc.*, 33 F.3d 253 (3d Cir. 1994).

expressly declined to adopt the Ninth Circuit's presumption in favor of attorney fees. (App. 8a). The Sixth Circuit's majority opinion decisively evidences the clear split among the Circuits on this issue.

Rather than apply a presumption of fees in conjunction with a balancing test, the Sixth Circuit applies only the traditional five-factor *King* test in order to award attorneys' fees, without the benefit of a presumption in favor of even the most successful of plaintiffs. However, the Sixth Circuit has clearly grappled with this issue and has recognized that this issue is evolving as the common law of § 1132(g) is developed. In fact, in its seminal decision of *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991) (relied upon by the Sixth Circuit in the present case), the Sixth Circuit expressly ruled that its precedent of imposing a balancing test under ERISA for attorneys' fees, rather than creating a presumption in favor of attorneys' fees, may not "turn out to be the final word on the subject":

> . . . [T]he courts may take into consideration any of the legitimate, relevant purposes for which fee-shifting has been permitted or proposed, including punishing bad faith litigants, providing the plaintiff with complete relief in appropriate cases, preventing the unjust enrichments of those who benefit from successful litigation, or removing deterrents to meritorious litigation by reducing the disparity between the resources available to the parties. The *King-Eaves* factors, which include many of the traditional reasons for awarding fees, are as good a place as any to begin the development of a common law fee-shifting under ERISA, even if they do not turn out to be the final word on the subject.

Id. at 1303-04 (citations omitted).

Mr. Foltice acknowledges that the Sixth Circuit Court of Appeals has not established a presumption of an award of attorney's fees in ERISA cases. It is evident that the Sixth Circuit, in *Armistead*, stated that the ERISA attorney fee provision must evolve, and that the Sixth Circuit may have to revisit that issue. The Sixth Circuit's opinion in this case has evolved this issue to the point, as Judge Wiseman in his dissent states, that the Sixth Circuit has now created a "presumption *against* awarding attorney fees"[5] (App. 26a), a presumption that Judge Wiseman adamantly counseled against.

Based on the above analysis, a hopeless three-way conflict exists among the Circuits regarding the appropriate standard for awarding attorney's fees under ERISA in cases involving successful plaintiffs. If the Sixth Circuit's decision in this case stands, implying a presumption *against* fees for prevailing beneficiaries in ERISA cases, yet a fourth split on the same issue exists. It is evident that this case is fertile ground for this Court to apply, once and for all, a uniform decision with respect to attorney fees under ERISA. This case affords this Court the opportunity to do so on stipulated facts, and without an

---

[5] Notably, the trend in other Circuits shows, at the least, that the practical effect of a *King*-type balancing analysis is that fees are generally awarded to prevailing plaintiffs. *See Meredith v. Navistar International Transportation Corp.*, 935 F.2d 124 (7th Cir. 1991); *Miele v. New York State Teamsters Plan*, 831 F.2d 407 (2d Cir. 1987) (three employees who successfully obtained pension benefits were entitled to attorneys' fees); *Groves v. Modified Retirement Plan*, 803 F.2d 109 (3d Cir. 1989) (pension plan participant who successfully pursued litigation against a plan for failing to disclose reason for benefits denial was entitled to attorney's fees).

appeal of the issues of the underlying merits to interfere with this analysis.

II. The Conflict with this Court's Precedent.

The Sixth Circuit is not only in conflict with other Circuit Courts, it is also in direct conflict with the controlling precedent of *this* Court. The Sixth Circuit wholly misconstrued this Court's analysis in *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 391-92, 90 S. Ct. 616, 625, 24 L.Ed.2d 593 (1970), which articulated this Court's philosophy underlying the "common fund" doctrine.

In addressing the fourth factor of the *King* balancing test to determine whether Mr. Foltice was entitled to attorneys' fees, the Sixth Circuit conceded that four other Guardsman employees were in a situation comparable to Mr. Foltice's. (App. 10a). However, the majority goes on to rely on *Armistead* to state that the fourth balancing test factor really constituted a codification of the "common fund doctrine of common law." (App. 10-11a). Because the District and Sixth Circuit Courts determined that the benefit realized by the four participants was "incidental" (App. 10a), Mr. Foltice's case did not, in the Sixth Circuit's opinion, result in the creation of a "common fund."

As Judge Wiseman in his dissent points out, the majority's holding places a *"de facto* prohibition against consideration of 'incidental' benefits derived by other participants which are not the result of litigation creating 'a "common fund" within the meaning of the common law doctrine of that name.' " (App. 22a). Judge Wiseman then proceeds to flesh out the *Mills* decision in which the Supreme Court articulated the philosophy underlying the

"common fund" doctrine. (App. 22-23a). Judge Wiseman correctly concludes, based on *Mills*, that the dispositive issue in examining the fourth factor of *King* is "not whether the benefit derived by others "is 'incidental', nor whether 'most of the participants in and beneficiaries of the Guardsman plan stood to gain nothing from this lawsuit.' " (App. 23a). Rather, the fact that others clearly benefitted from this litigation, collecting a windfall, at plaintiff's expense, is the proper consideration under *King*'s fourth factor. The majority's erroneous reliance on the "common fund" theory in applying the fourth factor of the *King* balancing test, thus, results in an "unjust and erroneous" analysis. (App. 22a).

In misconstruing the underlying philosophy and purposes of the Supreme Court's "common fund" doctrine, the Sixth Circuit failed to properly apply this Court's prior precedent on this issue. Indeed, to permit others to obtain the full benefit of Mr. Foltice's efforts without contributing equally to the litigation expenses unjustly enriches all other Guardsman plan beneficiaries who were not required to be embroiled in the long-arm of ERISA litigation. Because the Sixth Circuit misconstrued this Court's precedent with respect to the "common fund" doctrine, Mr. Foltice believes this case should be revisited by this Court.

III. The National Importance of This Case.

This case is of nationwide importance because the attorney fee issue under ERISA, which is federal remedial legislation, will necessarily affect, on a nationwide basis, whether attorneys will aid mistreated plan participants in

pursuing wholly meritorious ERISA claims. In addition, with the current split in the Circuits, an attorney may choose to represent a plaintiff in a Circuit granting a presumptive award of attorneys' fees while the same attorney would not take the risk in a less favorable jurisdiction.

If the Sixth Circuit's precedent stands and if attorneys' fees are denied in a case in which the plaintiff secures a complete victory, as Mr. Foltice did, no competent counsel will take a low award, high-risk case and attempt to successfully assert meritorious arguments on behalf of wrongfully treated pension plan participants. Attorneys, noting the small potential for recovery and realizing that completely successful litigation may result in absolutely no recovery of attorneys' fees, will shun the representation. Further, refusal to award fees in this and similar cases may completely reduce or obliterate the recovery of the plaintiff because the plaintiff is left with attorney fee bills, often in excess of their recovery.

In this case, the actual attorneys' fees through entry of the District Court Judgment, without a Lodestar multiplier, were $19,672.25. Mr. Foltice was awarded $20,827.04 in back pay pension payments, and $425.00 per month for the balance of his life.

Judge Wiseman, in his dissenting opinion for the Sixth Circuit, stated:

> Foltice's attorneys at Varnum, Riddering, Schmidt & Howlett spent 119.75 hours (excluding this appeal) during nearly three years of litigation, time no doubt enlarged by Guardsman's repeated insistence on its "downright unreasonable" positions. Foltice's lawyers' fees

> of $19,672.25 would, if insisted upon, deprive him of his entire lump sum award and more than a third of his expected pension.
>
> By finding, as the majority does, that the so-called *Armistead* test is not satisfied because plaintiff was not actually denied access to the courts punishes the attorneys in this case for their noble gesture. Moreover, because it is unclear under this facile approach what circumstances would constitute a showing that a "suit could not have been brought at all but for the prospect of fee-shifting", a "Catch-22" situation is created for future ERISA plaintiffs and attorneys, i.e. there can be no consideration of the issue unless the case is brought into court. Moreover, instead of encouraging emulation of the laudatory conduct evinced by the attorneys in this case, the majority discourages other attorneys from advocating on behalf of ERISA plaintiffs, a segment of the population least able to afford litigation expenses.

(App. 24a) (footnote omitted).

If the Sixth Circuit Court of Appeals' decision stands as ERISA precedent, no plan participant would be able to obtain any competent counsel, because attorneys, based on this case, and based on the jurisdiction in which no presumption of attorney's fees exists, will know that the economic burden of litigation will not be distributed fairly. Companies which are well able to afford the cost of the plaintiff's litigation would merely collect a windfall when the potential for recovery is so minor that potential plaintiffs cannot secure counsel. Bearing the cost of the litigation they caused truly prevents companies like these Defendants from abusing their power by arbitrarily and

capriciously denying benefits to unsuspecting plan participants.

In addition to the other participants who are directly benefitted from this particular lawsuit, this lawsuit will benefit ERISA plan participants generally, and on a national level, in that it will strike a blow against inconsistent denials of pension benefits to other employees. Further, the decision to award attorney's fees would clearly benefit any other plan participants who are denied coverage and broaden the scope of relief available under ERISA. *See Egert v. Connecticut General Life Insurance Co.*, 768 F. Supp. 216, 218 (N.D. Ill. 1991).

For these reasons, benefit has been sought through Mr. Foltice's lawsuit and a common benefit achieved for similarly-situated plan participants. However, the continued refusal to award presumptive attorneys' fees in favor of wholly successful plan participants with small recoveries would successfully deter competent attorneys from handling low award, high-risk ERISA matters, and the humanitarian purposes of ERISA's remedial legislation would be completely obviated.

Even assuming this Court determines the presumption of attorney's fees under ERISA is not warranted, the Sixth Circuit still mishandled Mr. Foltice's claim on appeal. First, the majority opinion "sets a bad precedent by collapsing 'bad faith or culpability' into a single test." (App. 20a). The majority simply dismissed the District Court's error in, ultimately, applying only a bad faith standard as opposed to analyzing whether "culpability" occurred in the present case. (App. 17a). Thus, and in accord with Judge Wiseman's dissenting opinion, "the

majority disregards the plain language of *King* and ignores the record evidence." (App. 17a). In addition, as pointed out by Judge Wiseman in his dissent, a collapsing of the culpability or bad faith standard into a single test for bad faith will tend "to over-emphasize the role of this first element of *King*'s five-part test." (App. 20a).

Second, the Sixth Circuit erred in applying the Sixth Circuit precedent announced in *Edwards v. State Farm Mutual Automobile Insurance Co.*, 851 F.2d 134, 136 (6th Cir. 1988). In the majority opinion, the Sixth Circuit asserted that "our circuit has squarely held that where statements in a summary plan description are in conflict with the language of the plan itself, 'the summary [plan description] shall govern.' " (App. 12a). In the words of Judge Wiseman, "this assertion is simply incorrect." (App. 25a). *Edwards* specifically involved a detrimental reliance matter, clearly not an issue in the present case. In fact, *Edwards* is not in the least bit pertinent to this matter. "Consideration of the summary plan would not have altered the district court's determination on the merits and, with regard to the relative merit of the parties positions under *King*, is weightless." (App. 26a).[6]

In view of the pervasiveness of the conflict among the Circuits, and the fact that the Sixth Circuit's decision

---

[6] In addition, as the summary plan description in the present case clearly states, "**IN THE EVENT OF ANY CONFLICT BETWEEN THIS BOOKLET AND THE PLAN DOCUMENTS, THE PLAN DOCUMENTS WILL GOVERN.**" (Stipulated Facts 26, App. 50a) (capitalization in original). Thus, the Sixth Circuit's conclusion on this issue is completely unmeritorious.

below completely nullifies the ability of competent counsel to recover attorney's fees even in the most successful cases, the Sixth Circuit's precedent perpetuates an unfairness and injustice to the average American ERISA plan participant. Such a result should not be obtained without this Court's review.

CONCLUSION

For all the foregoing reasons, the Petition should be granted and the Attorneys' Fees Judgment below reversed.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Attorneys for Plaintiff Foltice

Date: January 23, 1997

MARK S. ALLARD (P-38164)*
MARY C. BONNEMA (P-48789)
Business Address and Telephone:
Bridgewater Place, P.O. Box 352
Grand Rapids, Michigan
49501-0352
(616) 336-6000

**Counsel of record*

No. 94-2375

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETER FOLTICE, *Plaintiff-Appellant,*	)
v.	) ON APPEAL from the United States District Court for the Western District of Michigan
GUARDSMAN PRODUCTS, INC., et al., *Defendants-Appellees.*	)

Decided and Filed October 30, 1996

Before: NELSON and SILER, Circuit Judges; WISEMAN, District Judge.*

NELSON, J., delivered the opinion of the court, in which SILER, J., joined. **WISEMAN, D.J.** (pp. 14-23), delivered a separate dissenting opinion.

DAVID A. NELSON, Circuit Judge. This is an appeal from a denial of attorney fees in an ERISA case that arises out of a disputed claim for pension benefits. On the facts presented, as we read the record, the denial of attorney fees reflects no abuse of discretion or other reversible error; we shall therefore affirm the district court's decision.

---

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

I

Plaintiff Peter Foltice, an employee of defendant Guardsman Products, Inc., suffered a severe knee injury at work early in 1976. Permanently disabled by the accident, Mr. Foltice has been receiving workers' compensation benefits ever since. These benefits – which came to $429 per month in 1992 – have been funded entirely by Guardsman. Mr. Foltice has performed no work for Guardsman since the date of his accident, which was January 19, 1976.

Pursuant to a labor agreement negotiated many years ago with the union that represented employees in Mr. Foltice's collective bargaining unit, Guardsman has long maintained a pension plan (the "Guardsman Products, Inc. Bargaining Employees' Retirement Plan") for its union employees. According to Article IV, §4.7B of the Plan, pension benefits are not payable to a participant who is "receiving accident or sickness benefits under any plan to which the Company has contributed. . . . "

If the workers' compensation benefits received by Mr. Foltice constitute "accident" benefits within the meaning of §4.7B, the language of the Plan precludes Mr. Foltice from receiving pension benefits too. If workers' compensation benefits do not constitute accident benefits, on the other hand, receipt of such benefits does not defeat the right of a participant to receive pension benefits as of a date – April 1, 1990, in Mr. Foltice's case – determined on the basis of the participant's age.

There is no evidence that Mr. Foltice requested or received a copy of the Plan itself until well after April 1 of 1990. As required by law, however (see §101 of the

Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. §1021)), Mr. Foltice was furnished a summary description of the Plan's terms. This "Summary Plan Description" stated that receipt of workers' compensation benefits would bar the payment of pension benefits. Written "in a manner calculated to be understood by the average plan participant," as required by §102 of ERISA (29 U.S.C. §1022), the Summary Plan Description told participants, in straightforward language, that:

> "Benefits are not paid for periods during which you are receiving sickness and accident benefits from a Company-sponsored plan or worker's compensation benefits." Summary Plan Description, Paragraph 10, final sentence.

Mr. Foltice did not apply for pension benefits when he reached qualifying age in 1990. In 1992, however, he apparently presented an oral claim for such benefits in a conversation with Guardsman's Human Resources Director, Robert Chesnover. Mr. Chesnover contacted a representative of the Wyatt Company – an actuarial consulting firm that is said to have drafted the Guardsman pension plan – and was told by Wyatt that under §4.7B of the plan "an employee will receive no benefit payments for the periods during which the employee received Workers' Compensation." Mr. Chesnover so advised Mr. Foltice, sending him a copy of Article IV of the Plan.

Mr. Chesnover was one of four members of a Pension Committee that had responsibility for general administration of the Plan. The other members were Bernadette Schafer, who was the Controller in Guardsman's Grand Rapids Division, and two union representatives. An affidavit executed by Ms. Schafer states (1) that Mr. Foltice's

pension claim was discussed at a Pension Committee meeting attended by all four members; (2) that she (Ms. Schafer) indicated to the Committee that the plan contained provisions under which workers' compensation benefits were to be offset against pension benefits; and (3) that no member of the Committee disputed the proposition that there was to be an offset.[1] Although this discussion was not reflected in any minutes of the Committee, no one – including the union members – has challenged the accuracy of Ms. Schafer's account of what transpired.

When Mr. Chesnover advised Mr. Foltice that he could not receive pension benefits at the same time he was receiving workers' compensation benefits, Mr. Foltice consulted the attorney (Themis Fotieo) who had represented him on his workers' compensation claim. Attorney Fotieo called Mr. Chesnover, who referred him to §4.7B of the Plan. Mr. Fotieo subsequently took the position that this section did not apply to workers' compensation benefits, pointing out that elsewhere in the plan document there were specific references to "workers' compensation" that appeared to exclude sickness and accident

---

[1] In actuality, as we have seen, accident benefits were not merely to be "offset" against pension benefits; under §4.7B of the Plan as drafted, receipt of accident benefits would bar payment of pension benefits altogether, even where the pension benefits would have exceeded the accident benefits. Guardsman preferred the offset approach – an approach that may well have been intended all along, and that was obviously more favorable to employees – and the Wyatt Company subsequently undertook to rewrite the plan along these lines.

benefits of any other kind.[2] "Thus," Mr. Fotieo wrote in one of the letters he sent Guardsman's counsel, "I am led to believe that the drafter(s) of this document intended something different when they used the phrase 'workers' compensation' than when they used the phrase 'sickness and accident.' "

Guardsman called Mr. Fotieo's attention to the final sentence of Paragraph 10 of the Summary Plan Description, but Mr. Fotieo denied that this affected the meaning of the Plan instrument itself. "It is our belief," Mr. Fotieo wrote Guardsman's lawyers, "that the retirement plan does not allow for a deduction for workers' compensation benefits, notwithstanding the conflicting phrase in the 'Summary Plan.' We hereby demand that your client promptly start paying retirement benefits to our client . . . [seeing] to it that his application is processed and that his payments are made up retroactively."

In connection with this demand, Mr. Foltice signed a retirement benefit election form in which he exercised an option to receive a reduced benefit so that his wife could obtain benefits too (at a rate 50 percent of his) if he should predecease her. Under this option the pension benefits to which Mr. Foltice would be entitled if his attorney's legal position were sustained came to $400.52 a month.

---

[2] The parties subsequently stipulated that "[a]t least eight times in the Plan, Guardsman utilized the words 'Worker's Compensation Benefits' when they were referring to Workers' Compensation Benefit issues."

Following exercise of the option, Guardsman's attorneys sent Mr. Fotieo a letter rejecting the demand for payment of retirement benefits. The letter reiterated a previous suggestion that "[t]his plan has been interpreted to include workers compensation as an 'accident or sickness benefit,' "[3] and the letter went on to state that the plan "allows Guardsman a reasonable degree of leeway in how it interprets the plan." The rejection letter then continued as follows:

> "The issue is not whether your client's interpretation of the plan is reasonable or whether there is a more reasonable interpretation of the plan. Under the controlling authority of the United States Supreme Court [a reference to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)], the issue is whether Guardsman's interpretation of the plan is so unreasonable as to constitute an abuse of its discretion. We continue to believe that there has been no abuse of Guardsman's discretion and that its interpretation of the plan is fair, reasonable and legally justifiable."

---

[3] The parties subsequently stipulated that there were no minutes reflecting such an interpretation by the Pension Committee, and the defendants have acknowledged that there was no case prior to Mr. Foltice's in which benefits had been denied on this basis. The Summary Plan Description had been prepared before Mr. Foltice's claim arose, however, and Paragraph 10 of the Summary cannot be squared with §4.7B of the Plan except as a reflection of the interpretation advanced by Guardsman – *i.e.*, the interpretation under which "accident or sickness benefits" includes workers' compensation benefits. As we have seen, this was the interpretation placed on the Plan by the actuarial consulting firm that had drafted the instrument in the first place.

The district court, as it turned out, disagreed with the conclusion that Guardsman's interpretation was legally justifiable. On cross-motions for summary judgment the court resolved the merits of the dispute in favor of Mr. Foltice. By judgment order entered on July 28, 1994, the district court awarded Mr. Foltice past due pension benefits of $20,827.04 and declared that Mr. Foltice was entitled to pension benefits of $400.52 per month for the rest of his life, with a survivor's benefit of $200.26 per month for Mrs. Foltice thereafter should he predecease her. There has been no appeal from this judgment.

Mr. Foltice subsequently moved for an award of prejudgment interest, costs, and attorney fees. The district court disposed of the motion by allowing costs of $120 and prejudgment interest of $2,559.64, while declining to award any part of the attorney fees sought. (The motion had requested "lodestar" attorney fees totaling $23,579.75, plus a 50 percent "multiplier.") Mr. Foltice has perfected a timely appeal from the portion of the order in which the court denied attorney fees.

II

Under §502(g)(2) of ERISA (29 U.S.C. §1132(g)(2)), the award of reasonable attorney fees is mandatory where a fiduciary has sued successfully to enforce an employer's obligation to make contributions to a multiemployer plan. In any other action under ERISA, however, the statute provides that "the court in its discretion *may* allow a reasonable attorney's fee and costs of action to either party." ERISA §502(g)(1) (29 U.S.C. §1132(g)(1)) (emphasis supplied). In cases of the sort before us here,

our circuit recognizes no presumption as to whether attorney fees will be awarded. See *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1301-02 (6th Cir. 1991), where we rejected the proposition – followed by the Ninth Circuit in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984) – that a plan participant or beneficiary who wins an ERISA action "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

When exercising the discretion vested in the district court by 29 U.S.C. §1132(g)(1), we have said, the district court should consider the following five factors:

> "(1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions." *Sec. of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985).

The five factors – sometimes referred to in this circuit as the "*King* factors," although they originated elsewhere – have been cited in numerous subsequent cases. *See, e.g., Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987); *Central States Pension Fund v. 888 Corp.*, 813 F.2d 760, 767 (6th Cir. 1987); *Sweet v. Consol. Aluminum Corp.*, 913 F.2d 268, 271 (6th Cir. 1990); *Armistead*, 944 F.2d at 1301; *Tiemeyer v. Community Mutual Ins. Co.*, 8 F.3d 1094, 1101 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1371

(1994); *Wells v. United States Steel*, 76 F.3d 731, 736 (6th Cir. 1996).

The *King* factors are not statutory, of course, and need not be parsed as though they were. The factors simply summarize considerations that have sometimes been deemed significant in other cases – and, as the district court correctly noted in the case at bar, "[t]hese considerations represent a flexible approach; none of them is necessarily dispositive."

With regard to the first of the *King* factors – "the degree of the opposing party's culpability or bad faith" – the district court concluded that Guardsman's rejection of Mr. Foltice's claim for pension benefits "was erroneous, even arbitrary, but did not evidence a degree of culpability approaching bad faith." For reasons that we shall discuss in connection with the fifth factor, we doubt that Guardsman's rejection of the claim was "arbitrary." If Guardsman was culpable at all, however, we are satisfied that its culpability was relatively slight – and we fully agree with the district court that there was no bad faith here.

In his brief on appeal Mr. Foltice argues that the district court committed reversible error because it addressed the issue of bad faith "without considering the defendant's culpability." The argument is not persuasive. The district court obviously did consider culpability, and found a higher degree of culpability than we would have done. If the district court erred in its assessment of culpability, the error hardly helps Mr. Foltice.

There is no dispute as to the second *King* factor; the defendants admittedly have the ability to pay reasonable

attorney fees, and the district court so found. This factor alone is not dispositive, of course. *See Neusser*, 810 F.2d at 557.

The third factor – the deterrent effect of a fee award on other plan administrators – is one that is likely to have more significance in a case where the defendant is highly culpable than in a case such as this one. Honest mistakes are bound to happen from time to time, and fee awards are likely to have the greatest deterrent effect where deliberate misconduct is in the offing. The district court recognized this, concluding that the defendants' decision to deny Mr. Foltice's claim "does not present the sort of culpability that warrants punishment in his case or deterrence in others." We agree.

As to the fourth factor, the district court saw "no evidence that the plaintiff sought, through this action, 'to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA.' " Again we agree. The merits of the case do not turn on the resolution of any difficult ERISA question, and most of the participants in and beneficiaries of the Guardsman plan stood to gain nothing from this lawsuit.

It is true that there were four other Guardsman employees who happened to be in a situation comparable to Mr. Foltice's. As the district court correctly noted, however, the benefit realized by these four participants was "incidental;" the litigation did not result in the creation of a "common fund" within the meaning of the common law doctrine of that name. See *Armistead*, 944 F.2d at 1304, suggesting that the fourth factor "appears to

be a codification of the common fund doctrine of the common law."[4]

We turn now to the fifth factor, "the relative merits of the parties' positions." As suggested above, it seems to us that any error committed by the district court with regard to this factor was an error in favor of Mr. Foltice.

In the opinion it delivered from the bench in announcing that summary judgment would be entered for Mr. Foltice and against Guardsman, the district court expressed the view that the phrase "accident or sickness benefits," as used in §4.7B of the Plan, was a "term of art . . . consistently treated throughout the plan as excluding workers' compensation benefits. . . . " The court acknowledged that the Summary Plan Description expressly told participants – in "language [that] may very well describe the party's intent more accurately than does the plan itself" – that "benefits are not paid for periods during which you are receiving sickness and accident benefits from a Company-sponsored plan or workers'

---

[4] The *Armistead* panel also noted that the fourth factor might weigh in favor of a plaintiff who showed that his suit could not have been brought at all but for the prospect of fee-shifting. In the case at bar Mr. Foltice was ably represented prior to suit by Attorney Themis Fotieo, and there has been no showing that Mr. Fotieo declined to handle the litigation because of anything related to the prospect of fee-shifting. The firm that did handle the litigation – Varnum, Riddering, Schmidt & Howlett LLP – very generously agreed to take no fee other than one awarded by the court. The Varnum firm obviously recognized that the court might not award a fee, and was willing to prosecute the lawsuit anyway. The firm's willingness to take the case on this basis is commendable, but it does not satisfy the test suggested in *Armistead*.

compensation benefits." But the court characterized the Summary Plan Description booklet as "extrinsic evidence" which "should not be used to add terms to a contract that is plausibly complete without them." In this connection the court noted that the booklet itself says that "[i]n the event of any conflict between this booklet and the plan document, the plan document will govern."

The district court's analysis is consistent with a view implied by the author of this opinion in *Musto v. American General Corp.*, 861 F.2d 897, 905 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). Unfortunately for Mr. Foltice, however, our circuit has squarely held that where statements in a summary plan description are in conflict with the language of the plan itself, "the summary [plan description] shall govern." *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988).

It is true that under the law of this circuit, language in a plan summary that is merely ambiguous should not be permitted to trump unambiguous language in the plan itself, particularly where participants receive both the plan and the summary in a single package. See *Lake v. Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1379 (6th Cir. 1996). In the case at bar, however, the language of the Summary Plan Description is not ambiguous – and we have no reason to believe that the Plan and the Summary were distributed to Guardsman employees in a single package. Accordingly, in our view, the statement in the Summary Plan Description that pension benefits would not be paid for periods in which workers' compensation benefits were being received should not have been dismissed as "extrinsic evidence."

This is not to say that Guardsman would necessarily have prevailed on the merits of the case if the Summary Plan Description had been given the consideration to which it was entitled. Elsewhere in the Summary, as the district court observed, "sickness and accident benefits" and "workers' compensation benefits" were not used as synonymous terms. Notwithstanding the deference accorded decisions made by plan fiduciaries in the exercise of their discretionary powers, see *Firestone Tire & Rubber,* 489 U.S. at 115, it is conceivable that the district court would have resolved the merits in favor of Mr. Foltice even if the Summary Plan Description had been treated as an integral part of the Plan, as it should have been, and not relegated to the purgatory reserved for "extrinsic evidence."

Be that as it may, we can safely say that at the very least this was a closer case on the merits than the district court thought it was. Yet notwithstanding the flaw in the legal reasoning on which Mr. Foltice's claim for pension benefits was denied, the order concerning attorney fees makes the point, quoting *Armistead,* 944 F.2d at 1304, that the defendants' position was "no more devoid of merit than that of any other losing litigant." Given our analysis of the relative merits of the parties' positions, the quoted words seem even closer to the mark than the district court realized.

Following its analysis of the five *King* factors, the district court's order concerning attorney fees used these words in stating the court's conclusion: "[T]he circumstances of this case do not justify a departure from the traditional 'American Rule' that each party ordinarily bears its own attorney fees." Citing *Armistead,* 944 F.2d at

1303, Mr. Foltice points out, correctly, that the American Rule has been repealed in ERISA cases. Mr. Foltice goes on to contend – incorrectly in our view – that the district court "relied" on the American Rule notwithstanding its repeal. What the district court relied on, we believe, was the *King* factors; it was the court's analysis of the *King* factors that drove the decision, as we read the order, and the reference to the "American Rule," in context, looks to us like little more than a rhetorical flourish.

Lest there be any misunderstanding, however, we take this opportunity to reiterate that neither the American Rule nor the opposing "English Rule" governs attorney fee questions in ERISA cases of this type. When Congress wants to provide that the loser shall pay the winner's attorney fees, it knows how to say so. See 29 U.S.C. §1132(g)(2). Congress has not done that here. Neither has Congress seen fit to create any kind of statutory presumption regarding the payment of attorney fees in cases of this type. Congress having chosen to leave the matter for the courts to decide, in the exercise of their discretion, case-by-case, we think it would ill-behoove us to limit judicial discretion by creating a non-statutory presumption either for or against the award of attorney fees.

Mr. Foltice argues that there are strong policy reasons for "revisiting" the *Armistead* decision and establishing a presumption in favor of attorney fees for prevailing plaintiffs. But even if our circuit precedent rule did not require us to follow *Armistead* – and it does – we would consider it more appropriate for these arguments to be addressed to Congress.

Finally, acknowledging that this court may choose not to revisit *Armistead*, Mr. Foltice urges us to hold in any event that the district court abused its discretion in balancing the *King* factors. We decline so to hold. As the *King* panel noted, citing *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980), "an abuse of discretion exists only when the court has the definite and firm conviction that the district court made a clear error of judgment in its conclusion upon weighing relevant factors." *King*, 775 F.2d at 669. Here we have no definite and firm conviction that the district court made an error of judgment. On the contrary, after examining the relevant factors ourselves, we have a definite and firm conviction that the district court reached the correct result.

The denial of attorney fees is **AFFIRMED.**

WISEMAN, District Judge, dissenting. As recognized by the Second Circuit, ERISA's attorney fees provision is remedial legislation which should be liberally construed in order to vindicate the rights and protect the interests of those persons which it is meant to protect, i.e. participants in and beneficiaries of pension plans. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987). The majority opinion is inconsonant with this approach.

Prior to severely injuring his knee on the job, Mr. Foltice was an employee of Guardsman Products, Inc., and its predecessor-in-interest for thirty years. As negotiated by his union, part of Mr. Foltice's compensation package during his thirty-year career with Guardsman included the pension benefits underlying this litigation.

Although Mr. Foltice became eligible for his pension benefits in 1990, Guardsman began paying him only upon being ordered to do so by the district court in 1994. Notwithstanding this success in vindicating his rights, in light of more than $19,000 of legal fees and costs, Mr. Foltice's victory would have been hollow but for his attorneys' pledge to this Court that they would take no fees unless awarded by the court. While such a pledge does honor to the attorneys' sense of justice, it neither corrects the district court's error in denying attorneys fees nor establishes a likely precedent for other attorneys in similar cases. Accordingly, the district court's errors in applying the *King*[1] test, particularly the first element of "culpability or bad faith," is compounded by the majority's affirmation of that decision. For the reasons that follow, I respectfully dissent.

I

In considering whether attorney fees were warranted, the district court found that Guardsman's "denial of benefits was erroneous, even arbitrary, but did not evidence a degree of culpability evidencing bad faith."[2] As the election of the disjunctive "or" in *King* demonstrates, culpability and bad faith are not the same. This Court has defined "bad faith" as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Benkert v. Medical Protective Co.*, 842

---

[1] *Secretary of Department of Labor v. King*, 775 F.2d 666 (6th Cir. 1985).

[2] *Order Concerning Attorney Fees, Prejudgment Interest and Costs*, October 25, 1994, at page 2.

F.2d 144, 149 (6th Cir. 1988). On the other hand, culpability is defined merely as "blameworthiness," Black's Law Dictionary 379 (6th ed. 1990), "implying that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose." *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 856-57 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). To read *King* as the District Court did is to edit out the terms "culpability or" from *King*. Culpability and bad faith are not synonymous and defining culpability solely in terms of bad faith was clear error.

The majority dismisses the error, asserting "the district court obviously did consider culpability, and found a higher degree of culpability than we would have done." In affirming the district court in this manner, the majority disregards the plain language of *King* and ignores the record evidence. "[C]ulpability evidencing bad faith" neither distinguishes between the two concepts nor indicates consideration of culpability separate and apart from bad faith. Rather than being an indication of separate consideration of the culpability factor, the finding that the denial of benefits was "erroneous, even arbitrary" is inherently a finding of culpability. The district judge went on to find Guardsman's refusal to be "downright unreasonable" and "an abuse of discretion, based on an illegitimate interpretation of plan language."[3]

This finding of culpability is supported by ample objective evidence in the record. In the letter of October

---

[3] *Order Concerning Attorney Fees, Prejudgment Interest and Costs*, October 25, 1994, at page 2.; Summary Judgment Motion Hearing, July 18, 1994, transcript at 45.

13, 1992, to Foltice's attorney, counsel for Guardsman asserted:

> This plan has been interpreted to include workers compensation as an "accident or sickness benefit." Employees have been advised of this by way of Page 10 of the Summary Plan Description which expressly states that no pension benefit will be paid during any period an accident or sickness benefit, including workers compensation, is received.

Guardsman could produce no evidence to support this assertion of a previous interpretation[4] and, by its own terms, the Summary Plan Description does not define an employee's benefits. Thus, these statements made in the context of dissuading Foltice from pursuing his pension benefits are inaccurate, misrepresentative, and, as such, evidence of defendants' culpability.

Likewise, in a 1992 Christmastime letter to Foltice's attorney, counsel for Foltice stated:

> Recognizing that you and your client want the plan interpreted differently, I suspect you will be tempted to rush off and file suit upon receipt of this letter. Before you do so, however, consider the following: Under the plan in question, Guardsman is vested with discretionary authority to determine eligibility and to construe the terms of the plan documents. This is

---

[4] *See Algae v. RCA Global Communications, Inc.*, 891 F. Supp. 875, 892 (S.D.N.Y.1994), *aff'd*, 60 F.3d 956 (2nd Cir. 1995) (persistence in pressing varying explanations for an event that defendants ultimately could not document is plainly relevant to culpability).

> significant, because it allows Guardsman a reasonable degree of leeway in how it interprets the plan. The issue is not whether your client's interpretation of the plan is reasonable or whether there is a more reasonable interpretation of the plan. Under the controlling authority of the United States Supreme Court, the issue is whether Guardsman's interpretation of the plan is so unreasonable as to constitute an abuse of its discretion.

This thinly veiled threat ("If you sue, you will lose") which relies on a conclusory and inaccurate statement of law and fact, and which was sent at a time (Christmas) when its impact could be most keenly felt, inescapably goes to culpability.

As this Court indicated in *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991), the issue of fee-shifting is an evolving area of the law under ERISA and the *King* factors are merely a starting point. Diminishing the distinction between culpability and bad faith is not, however, a desirable evolutionary direction.

Beyond the instant case, the majority's decision sets bad precedent by collapsing "bad faith or culpability" into a single test. Whereas bad faith is subjective and requires proof of motives that discovery in a beneficiary claim is unlikely to generate, culpability is objective and more easily proven from discoverable observations. The Third Circuit, which applies the same five-factor test, recently reversed an order denying attorneys' fees because the trial court there made the same error, compressing "culpability or bad faith" into an inquiry

focused on bad faith alone. *McPherson v. Employees' Pension Plan of American Re-Insurance Co., Inc.*, 33 F.3d 253 (3d Cir. 1994). As *McPherson* recognized, "bad faith normally connotes an ulterior motive or sinister purpose. A losing party may be culpable, however, without having acted with an ulterior motive." *Id.* at 256; *see also Disabatino v. Disabatino Brothers, Inc.*, 894 F. Supp. 810, 818 (D. Del. 1995); *Vintilla v. United States Steel Corp.*, 642 F. Supp. 295, 296-97 (W.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir.), *cert. denied, Belak v. U.S. Steel Corp.*, 484 U.S. 847 (1987) (finding no bad faith but "certain elements of culpability attributable to plaintiffs").

In addition, there are practical reasons for refusing to collapse "culpability or bad faith" into a single test for bad faith. Courts, including our own, that have subsumed an examination of "culpability or bad faith" into an obsessive search for bad faith alone tend to overemphasize the role of this first element of *King's* five-part test. *See, e.g., Tiemeyer v. Community Mutual Insurance Co.*, 8 F.3d 1094, 1102 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1371 (1994); *McPherson*, 33 F.3d at 256 (stating "as we read the district court's comments, they appear to reflect a view that the first, third, and fifth factors cannot favor an award in the absence of a finding that the defendants have acted with a sinister motive"). This is contrary to our precedent. Proof of bad faith is not a threshold element of a successful claim under §1132(g)(1). *Wells v. United States Steel*, 76 F.3d 731 (6th Cir. 1996). "The punishment of bad faith litigants is a legitimate purpose under ERISA, but not the only purpose." *Armistead*, 944 F.2d at 1304. While courts ought to search for the presence or absence of bad faith in applying the *King* test,

Armistead makes clear that such evidence, either way, is not outcome-determinative.

II

In regard to the third factor of *King* – the deterrent effect of a fee award on other plan administrators – the majority states that "[h]onest mistakes are bound to happen from time to time, and fee awards are likely to have the greatest deterrent effect where deliberate misconduct is in the offing." This reasoning is flawed. It will further the objectives of ERISA if fee awards are employed to deter behavior that falls short of bad faith conduct. *See Kann v. Keystone Resources, Inc. Profit Sharing Plan*, 575 F. Supp. 1084, 1096-97 (W.D. Pa. 1983) (in case where culpability has been shown, fee award will make plan "less likely and not so quick to deny benefits to other participants"). Even if Guardsman did not act in bad faith, the district court should have considered whether it would serve the objectives of ERISA to award counsel fees in an effort to deter conduct of the kind in which Guardsman engaged.

III

A similar difficulty exists with the majority's analysis of *King's* fourth factor – whether the party requesting fees sought to confer a common benefit or resolve significant legal questions. The majority concludes only that "the merits of the case do not turn on the resolution of any difficult ERISA question, and most of the participants in and beneficiaries of the Guardsman plan stood to gain nothing from this law suit."

Armistead instructs us to look beyond *King* in developing applicable considerations in ERISA fee-shifting determinations, particularly in regard to this factor and indicates that courts may provide the plaintiff with complete relief in appropriate cases, prevent the unjust enrichments of those who benefit from successful litigation, or remove deterrents to meritorious litigation by reducing the disparity between the resources available to the parties. 944 F.2d at 1304. *See Wells*, 76 F.3d at 736 (adopting *Armistead's* suggestion to expand *King* to consider whether the economic situation of the plaintiffs is such that they could not bring suit except for the prospect of fee-shifting).

Rather than consider the unjust enrichment derived from this litigation by other similarly situated participants in the Guardsman plan, the majority cites *Armistead* as limiting their consideration of obvious, relevant factors. Conceding that four other Guardsman employees "happened to be in a situation comparable to Mr. Foltice's", the majority extracts dicta from *Armistead* that "suggests" that the "fourth factor 'appears to be a codification of the common fund doctrine of common law' " and indicates that this language is a *de facto* prohibition against consideration of "incidental" benefits derived by other participants which are not the result of litigation creating "a 'common fund' within the meaning of the common law doctrine of that name." While the intent of this analysis is unclear, the result is both unjust and erroneous.

In *Mills v. Electric Auto-Light Company*, 396 U.S. 375, 391-392, 90 S. Ct. 616, 625, 24 L.Ed.2d 593 (1970), the

Supreme Court articulated the philosophy underlying the "common fund" doctrine as follows:

> While the American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained his suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. . . .
>
> To allow the others to obtain full benefits from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

Clearly, the dispositive issue is not whether the benefit derived by others is "incidental", nor whether "most of the participants in and beneficiaries of the Guardsman plan stood to gain nothing from this lawsuit." Others clearly benefitted from this litigation at plaintiff's expense. To fail to consider this fact based upon an artificial construction of the "common fund" theory is inequitable.

IV

In the same manner, the majority strictly construes "the test suggested in *Armistead*" to dismiss consideration of whether the plaintiff's case could have been brought at all but for the prospect of fee-shifting. There is ample evidence in the record that Foltice could not have

afforded to litigate this action without fee-shifting. Now 76 years old, Foltice has not worked since a knee injury in 1976. His only income, outside his pension, is a $372 monthly workers compensation payment. Foltice's attorneys at Varnum, Riddering, Schmidt & Howlett spent 119.75 hours (excluding this appeal) during nearly three years of litigation, time no doubt enlarged by Guardsman's repeated insistence on its "downright unreasonable"[5] positions. Foltice's lawyers' fees of $19,672.25 would, if insisted upon, deprive him of his entire lump sum award and more than a third of his expected pension.

By finding, as the majority does, that the so-called *Armistead* test is not satisfied because plaintiff was not actually denied access to the courts punishes the attorneys in this case for their noble gesture. Moreover, because it is unclear under this facile approach what circumstances would constitute a showing that a "suit could not have been brought at all but for the prospect of fee-shifting", a "Catch-22" situation is created for future ERISA plaintiffs and attorneys, i.e. there can be no consideration of the issue unless the case is brought into court. Moreover, instead of encouraging emulation of the laudatory conduct evinced by the attorneys in this case, the majority discourages other attorneys from advocating on behalf of ERISA plaintiffs, a segment of the population least able to afford litigation expenses.

---

[5] *Order Concerning Attorney Fees, Prejudgment Interest and Costs*, October 25, 1994, at page 2; Summary Judgment Motion Hearing, July 18, 1994, transcript page 45.

V

With regard to the fifth factor – the relative merits of the parties positions – the majority concludes that the district court's failure to consider language in the summary plan as dispositive was error in Mr. Foltice's favor. This conclusion is based on an assertion that this Circuit "has squarely held that where statements in a summary plan description are in conflict with the language of the plan itself, the summary plan description shall govern." This assertion is simply incorrect.

Edwards v. State Mutual Automobile Ins. Co., 851 F.2d 134 (6th Cir. 1988), relied on by the majority as authority for this position, pertains to a case where the plaintiffs detrimentally relied on a summary plan description. Detrimental reliance is not an issue here. Even accepting arguendo that *Edwards* is not distinguishable on that basis and does, in fact, stand as authority for the position asserted, then in light of 6th Circuit jurisprudence, *Edwards* must be viewed as an anomaly. *See Bryant v. International Fruit Products Co.*, 793 F.2d 118, 123 (6th Cir.), *cert. denied*, 479 U.S. 986 (1986) ("the handbook is not a part of the plan agreement and cannot be relied upon to modify or affect any provision of the plan . . . "); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("Such an assumption would conflict with what is said in the booklets ('the official Plan Documents will govern'), it would conflict with what is said in the policy ('[t]his Policy . . . shall constitute the entire contract') and it would seem in conflict with what is said in ERISA (the plan must be established pursuant to 'a written instrument,' of which the participants are to be furnished a 'summary')").

Edwards is clearly not pertinent to this case. Consideration of the summary plan would not have altered the district court's determination on the merits and, with regard to the relative merit of the parties positions under *King,* is weightless.

VI

A district court's discretion, properly guided by the *King/Armistead* methodology and subject to appellate review for abuse of the same, is adequate to protect the interests of ERISA beneficiaries and claimants. However, a danger is created when, as indicated by the underlying tenor of the majority's opinion in this case, an implicit presumption against awarding attorney fees is derived from the absence of a presumption in the prevailing plaintiff's favor. Based on the district court's abuse of discretion in misinterpreting the "culpability or bad faith" element of *King* and in failing to consider Foltice's financial ability to obtain a legal remedy for his deprived rights without fee-shifting, I would reverse the order of the District Court and remand for further consideration consistent herewith.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER FOLTICE,

Plaintiff,

v.

GUARDSMAN PRODUCTS, INC., BARGAINING EMPLOYEES' RETIREMENT INCOME PLAN, and GUARDSMAN PRODUCTS, INC., a Delaware corporation,

Defendants.

_____ /

Case No. 1:93-CV-897

HON. DAVID W. McKEAGUE

ORDER CONCERNING ATTORNEY FEES, PREJUDGMENT INTEREST AND COSTS

This action presents a claim for pension benefits under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). On July 28, 1994, after a hearing on cross-motions for summary judgment, the Court awarded judgment for plaintiff, awarding him past due pension benefits in the amount of $20,827.04. Now before the Court is plaintiff's motion for award of prejudgment interest, costs and attorney fees.

I. Attorney Fees

Pursuant to 29 U.S.C. § 1132(g)(1), the Court has discretion to award attorney fees in an action such as this.

The parties agree that the Court's discretion is guided by the following considerations:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Tiemeyer v. Community Mut. Ins. Co., 8 F.3rd 1094, 1101 (6th Cir. 1993), quoting *Secretary of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). These considerations represent a flexible approach; none of them is necessarily dispositive. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 558 (6th Cir. 1987). Applying these criteria, the Court finds an award of attorney fees is not appropriate in this case.

The Court awarded judgment to plaintiff because defendants' denial of pension benefits was an abuse of discretion, based on an illegitimate interpretation of plan language. The Court acknowledged that extrinsic evidence may have supported defendants' construction of the language's intendment, but held that resort to extrinsic evidence was inappropriate, because the language was unambiguous. As such, the language had to be enforced in accordance with its ordinary definition as used in other

parts of the plan documents. Defendants' denial of benefits was erroneous, even arbitrary, but did not evidence a degree of culpability approaching bad faith.

As to the second factor, it is undisputed that defendants have the ability to pay reasonable attorney fees.

The third consideration is whether an award of attorney fees would have a deterrent effect on other ERISA plan administrators under similar circumstances. Inasmuch as defendants' decision was erroneous but not made in bad faith, it does not present the sort of culpability that warrants punishment in this case or deterrence in others. Further, the carelessness of drafting that plagued this plan and gave rise to this action is a circumstance not likely to oft-recur.

With respect to the fourth factor, the parties agree that plaintiff's judgment will bear an incidental benefit to four other similarly situated employees of Guardsman Products, Inc. However, there is no evidence that plaintiff sought, through this action, "to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA."

Finally, the Court's judgment bespeaks its assessment of the relative merits of the parties' positions. The pension committee clearly made an erroneous decision, abusing its power by interpreting plan language inconsistent with its plain meaning. The committee's construction cannot, however, be fairly characterized as frivolous. Defendants' urging the Court to enforce the actual "intendment" of the plan notwithstanding its facially plain language represents a position "no more devoid of merit than that of any other losing litigant." *Armistead*,

supra, 944 F.2d at 1304. While this factor certainly weighs in plaintiff's favor, it is not so compelling, even when viewed in conjunction with the second factor, to persuade the Court that attorney fees should be awarded.

In sum, considering the prescribed factors together, the Court concludes, in the exercise of its discretion under 29 U.S.C. § 1132(g)(1), that the circumstances of this case do not justify a departure from the traditional "American Rule" that each party ordinarily bears its own attorney fees.

II. Prejudgment Interest

Prejudgment interest may be awarded in the discretion of the Court. *Drennan v. General Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993). "Awards of prejudgment interest are compensatory, not punitive, and a finding of wrongdoing by the defendant is not prerequisite to such an award." *Id;* see also *Tiemeyer, supra*, 8 F.3d at 1102.

Plaintiff claims entitlement to prejudgment interest in the amount of $2,559.64, for the period April 1, 1990 through July 1, 1994, during which he was wrongfully denied pension benefits. Plaintiff's claim appears to be reasonable and necessary to make him whole. To relieve defendants from payment of prejudgment interest would result in their unjust enrichment, creating an incentive for them and other insurers to delay payment, and would result in undercompensation of the plan beneficiary. See *Tiemeyer, supra*, 8 F.3d at 1102, citing *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 697 (7th Cir. 1991).

III. Costs

Plaintiff's request for costs in the amount of $120.00 is entirely reasonable and proper. Such costs are awardable in the Court's discretion under 29 U.S.C. § 1132(g) and are ordinarily awarded as of course to the prevailing party under Fed. R. Civ. P. 54(d).

IV. Conclusion

Accordingly, plaintiff's motion is **GRANTED in part** and **DENIED in part.** Plaintiff's motion for award of prejudgment interest in the amount of $2,559.64, and for costs in the amount of $120.00 is hereby **GRANTED.** Plaintiff's motion for award of attorney fees is **DENIED.**

IT IS SO ORDERED.

Dated: October 25, 1994

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER FOLTICE,

Plaintiff,

vs. No. 1:93-CV-897

GUARDSMAN PRODUCTS, INC.,
BARGAINING EMPLOYEES'
RETIREMENT INCOME PLAN,
and GUARDSMAN PRODUCTS, INC.,
a Delaware corporation,

Defendant.
_____/

MOTIONS FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE
Lansing, Michigan, July 18, 1994, at about 3:25 P.M.

APPEARANCES:

Mark S. Allard
Varnum, Riddering, Schmidt & Howlett
The Bridgewater Place
P.O. Box 352
Grand Rapids, MI 49501-0352

On behalf of Plaintiff;

Scott J. Gorsline
Warner, Norcross & Judd
900 Old Kent Bank Building
111 Lyon Street, N.W.
Grand Rapids, MI 49503-2489

On behalf of Defendant.

* * *

[p. 39] whether or not you are retired to get pension benefits now under federal law, it's a question of whether or not you've reached a standard statutorily set age of 70 and a half. These benefits would be available to an employee who was still working.

THE COURT: All right. Anything further, Mr. Gorsline?

MR. GORSLINE: No.

THE COURT: The court has carefully considered the pleadings in this case in light of the agreement by the parties that this case will be entirely adjudicated based on those motions for summary judgment as well as the oral argument this afternoon. The threshold issue that's presented by the plaintiff's claim for recovery of pension benefits under ERISA, the Employee Retirement Income Security Act, is whether the defendant's decision to deny benefits should be reviewed de novo or under the more differential, quote, arbitrary and capricious, unquote, standard of review.

As noted in the argument this afternoon, both parties appear to agree that this question is governed by the Supreme Court's holding in Firestone Tire and Rubber versus Bruch, 109 Supreme Court 948 at 956 to 57, 1989. As the court noted during the argument this afternoon, the court held, quote, a denial of benefits is to be reviewed under a de novo standard unless the benefit plan gives the administrator or [p. 40] fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, end quote. If the plan

confers such discretionary power, then the administrator's decisions in exercise of this power are subject to review only under the arbitrary and capricious standard.

Here, the employee benefit plan defines the powers of the pension committee in relevant part at paragraph 9.3 as follows, quote: The committee shall have such powers as are necessary for proper administration of the plan including the following: B, to make all determinations as to the right of any person to a benefit. The committee shall have no power to add to or subtract from or to modify any of the terms of the plan nor to change or add to any benefit provided by the plan nor to waive or fail to apply any requirement of eligibility for a benefit under this plan. In this court's opinion, these provisions clearly give the pension committee authority to determine eligibility for benefits thus satisfying the prerequisite under Firestone for differential review under the arbitrary and capricious standard.

The court recognizes in this holding that the plan language does not explicitly include the word, quote, discretionary, end quote. Determining the appropriate standard of review, however, is not simply a function of whether or not certain magic words are used in the plan. It [p. 41] need only appear on the face of the plan documents that the administrator has been given the power to construe disputed or doubtful terms or to resolve disputes over pension eligibility. If so, the administrator's decision will not be disturbed unless clearly unreasonable. See Block versus Pitney Bowes, Inc., 952 F.2d 1450 at 1453 to 54, D.C. Circuit, 1992.

In determining that the instant language is sufficient for the discretionary review standard, the court further notes the decision of the Sixth Circuit in Johnson versus Eaton Corporation, 970 F.2d 1569 at 1571 to 72, Sixth Circuit, 1992. In Johnson, plan language giving the administrator, quote, all such powers and authority as may be necessary to carry out the provisions of the plan, end quote, was held to be a sufficiently clear grant of discretionary authority. Clearly, the instant language more closely approximates that called for in Firestone than the Johnson language.

The court has considered the plaintiff's argument that the denial of benefits is essentially waived on interpretation or construction of a plan term, a power not expressly given to the pension committee. In fact, as the plaintiff correctly notes, the plan expressly denies the committee the power to modify plan terms. However, the power to interpret is different than the power to modify. See [p. 42] Fuller v CBT Corp., 905 F.2d 1055 at 1058, Seventh Circuit, 1990. Further, the power to determine eligibility for benefits which is expressly granted to the pension committee necessarily entails the power to interpret and apply eligibility provisions. See Johnson, 970 F.2d at 1572. Accordingly, applying the test established in Firestone consistent with the construction given it by the Sixth Circuit in Johnson, the court holds that the arbitrary and capricious standard of review applies in this case insofar as the pension committee's decision represents an exercise of its discretionary authority to interpret plan terms.

The court next proceeds to consider the merits of the denial of these benefits. The arbitrary and capricious

standard is the least demanding form of judicial review. Quote, When it is possible to offer a reasoned explanation based on the evidence for a particular outcome, that outcome is not arbitrary or capricious, end quote. Davis versus Kentucky Finance Co. Retirement Plan, 887 F.2d 689 at 693, Sixth Circuit, 1989. The plan administrator's decision will be overturned only if it is found to be an abuse of discretion, that is to say, downright unreasonable, not just clearly incorrect. Fuller, supra, 905 F.2d at 1058.

In this case the pension committee's denial of plaintiff's application for pension benefits is premised on paragraph 4.7B of the plan which provides that no pension [p. 43] benefits shall be payable with respect to any month for which the plaintiff – excuse me – for which the participant is receiving accident or sickness benefits. Here, the plaintiff continues to receive workers' disability compensation benefits.

Defendants contend that the term, quote, accident or sickness benefits, end quote, as used in paragraph 4.7B includes workers' compensation benefits and that therefore payment of pension benefits in excess of the amount of the workers' compensation benefits is precluded. In this court's opinion this construction defies the plan's plain language. It appears to this court that the words, quote, sickness and accident benefits, end quote, are a term of art which is not actually defined in the plan but which is consistently treated throughout the plan as excluding workers' compensation benefits and as pertaining to benefits paid in connection with nonoccupational accidents or sickness. Defendants do not directly refute this. Rather, they offer extrinsic evidence suggesting that

the intent of section 4.7B is to prohibit double payment of benefits whether the benefits being received by the participant relate to a work-related or a nonwork-related injury or condition. The defendants' argument may have some merit in other cases. Generally, however, the written terms of plan documents control and extrinsic evidence may not be introduced to vary or modify those terms unless [p. 44] they are shown to be ambiguous. Boyer v Douglas Components Corporation, 986 F.2d 999 at 1005, Sixth Circuit, 1993.

Extrinsic evidence may be used to fill or explain a, quote, yawning void, end quote, but should not be used to add terms to a contract that is plausibly complete without them. Bidlack v Wheelabrator Corp., 993 F.2d 603 at 608, Seventh Circuit, 1993. Here, in this court's opinion, the term, quote, sickness and accident benefits, end quote, have an unambiguous and definite meaning throughout the plan documents, a meaning that does not include workers' compensation benefits. Defendants ask the court to define the term in a unique way contrary to its ordinary definition as used in other parts of the plan documents. This inconsistency or disharmony the court is asked to countenance plainly indicates that what is at hand is not interpretation but variance or modification, a purpose for which extrinsic evidence is not to be considered and a power explicitly denied to the pension committee.

One of the items of extrinsic evidence proffered by defendants highlights this point. Defendants point out that the summary plan description states more clearly than paragraph 4.7B what was intended under the plan. Quote, bracket, Pension, end bracket, benefits are not

paid for periods during which you are receiving sickness and accident benefits from a company-sponsored plan or workers' [p. 45] compensation benefits. This language may very well describe the party's intent more accurately than does the plan itself. However, the summary plan description explicitly informs the reader, quote, In the event of any conflict between this booklet and the plan document, the plan document will govern, end quote.

Secondly and more relevantly, the above summary plan description language confirms by using both terms, quote, sickness and accident benefits, end quote, and, quote, workers' compensation benefits, end quote, that the terms are not synonymous and that the former does not include the latter. It is clear to this court that the pension committee's decision was based not on interpretation of an ambiguous term but an addition to or modification of unambiguous plain language. In so acting, the pension committee's decision must be deemed, quote, downright unreasonable, end quote, because ultra vires, that is, it is based on the exercise of a power expressly denied to the pension committee under the plan. The decision thus represents an abuse of discretion and must be reversed even under the differential arbitrary and capricious standard of review.

Alternatively, the court observes that the decision may be most properly subject to review and reversal under the de novo standard of review. The decision is subject to review [p. 46] under the arbitrary and capricious standard only if and to the extent that it represents an exercise of expressly granted discretionary authority. See Auto Club Insurance Association versus Health and Welfare Plans, Inc., 961 F.2d 588 at 593, Sixth Circuit,

1992. Quote, Differential standard of review is only appropriate when the trustees have acted within the bounds of the discretion given to them, end quote. Block, supra, 952 F.2d at 1454. Paren, In determining standard of review, what counts is the character of the authority exercised, end quote.

The defendant characterizes the pension committee as purporting to base its decision on exercise of its authority to interpret plan language. It is apparent to the court that defendant's characterization of the pension committee's rationale is suspect at best. To the extent the decision may be properly reviewed as an addition to or modification of unambiguous plan language, it represents the exercise of discretionary authority that is not conferred to the pension committee and is a decision subject to de novo review.

Additionally, this court has grave reservations as to whether or not the pension committee has actually exercised any authority they might have to which the court should give deference in this case at all. The only evidence of any action by the pension committee is the affidavit submitted by the defendant of Bernadette Schafer, who appears to have [p. 47] participated in a meeting of the committee during which Mr. Foltice's pension benefits were discussed. Her affidavit, read in a light giving the most favorable inferences to the defendant, simply states that after Mr. Foltice's pension benefit calculation was approved, she informed the committee that the plan contained provisions whereby workers' compensation benefits were to be offset against any pension benefit that was to be received. A review of the plan indicates that there is no such language within the plan

even if the plan is read to include workers' compensation benefits as included within the terms accident and pension benefits. Her affidavit further states that no member of the committee disputed that there was to be an offset. Even Ms. Schafer's affidavit does not state that there was any discussion by the committee as to whether workers' compensation benefits were included within the words accident and sickness benefits.

Accordingly, applying the de novo standard of review, the court also concludes that the pension committee's decision is not only invalid as ultra vires but also clearly erroneous in substance, contravening standard rules of contract interpretation, and must be reversed.

For the foregoing reasons an order shall issue reversing the pension committee's decision and directing the defendants to approve plaintiff's application for pension benefits in accordance with the plain language of the plan.

[p. 48] As the prevailing party in this matter, Mr. Allard, please prepare such an order, circulate it to the defendant for their approval. The order shall be filed with this court not later than July 27.

Is there anything further to come before the court this afternoon, Mr. Allard?

MR. ALLARD: Your Honor, the only other issue, Your Honor, is that we have reserved the right to ask for costs and attorney fees under ERISA, and I would like to be able to submit that after the entry of the judgment, and if Mr. Gorsline and I can agree, we'll

submit it that way. If not, we'll probably have to have a hearing on it.

THE COURT: Mr. Allard, you can file anything you want. Under the rules you've got to consult Mr. Gorsline first and you can only file your motion if there is – if the defendant fails or refuses to agree with the relief that you are seeking.

MR. ALLARD: Thank you, Your Honor.

THE COURT: Anything further, Mr. Gorsline?

MR. GORSLINE: No, thank you, Your Honor.

THE COURT: All right. Again, I want to repeat, I know there is a winner and a loser here and the winner's always happy and the loser's always unhappy, but these are some of the best briefs that this court has seen in the two and a half years that it has been hearing these cases. You [p. 49] articulated the issues well, there's no wasted verbiage, there are no personal attacks, and there are very little collateral issues that you pursued that didn't need to be pursued, and I want both of you and your firms to know that, win or lose, the court appreciates good advocacy.

MR. GORSLINE: Thanks.

THE COURT: Court stands adjourned.

(Proceedings concluded at 4:45 P.M.)

[p. 50] REPORTER'S CERTIFICATE

I, Sharon E. Fox, Official Court Reporter for the United States District Court for the Western District of

Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that on the date hereinbefore set forth I reported stenographically the proceedings had in the within-entitled and numbered cause; and I do further certify that the proceedings were transcribed by me with the use of computer-aided transcription under my direction and supervision and that the foregoing is a full, true, and accurate transcript of my original stenotype notes.

/s/ Sharon E. Fox
Sharon E. Fox (CSR-3342)
U.S. District Court
Reporter
315 West Allegan Avenue
Lansing, MI 48933

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER FOLTICE,

Plaintiff,

v.

GUARDSMAN PRODUCTS, INC., BARGAINING EMPLOYEES' RETIREMENT INCOME PLAN, and GUARDSMAN PRODUCTS, INC., a Delaware Corporation,

Defendant.

Case No. 1:93-CV-897

Hon. David W. McKeague

---/

Mark S. Allard (P38164)
VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Plaintiff
The Bridgewater Place
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

F. William McKee (P34347)
Scott J. Gorsline (P44094)
WARNER, NORCROSS & JUDD
Attorneys for Defendants
900 Old Kent Bank Building
111 Lyon Street, N.W.
Grand Rapids, MI 49503-2489
(616) 459-6121

---/

STIPULATED FACTS

NOW COME the parties, by and through their respective counsel, and hereby stipulate to the following facts, for purposes of resolving dispositive motions in relationship to the above-captioned matter. The issue of relevance, if any, will be addressed in each party's respective briefs.

I. PETER FOLTICE'S EMPLOYMENT HISTORY

1. Mr. Foltice's date of birth was June 15, 1919. On June 15, 1994, Mr. Foltice will be seventy-five (75) years old.

2. Mr. Foltice attained the age of seventy (70) years, six months on December 15, 1989.

3. On or about March 11, 1946, Peter Foltice was hired as a bargaining unit employee of Grand Rapids Varnish, the predecessor of Guardsman Products, Inc. ("Guardsman").

4. On or about January 19, 1976, Mr. Foltice suffered a severe knee injury during the course of his employment at Guardsman. At the time of his injury, Mr. Foltice was in the job classification of "batch blender."

5. Since January 19, 1976, Mr. Foltice has received Workers' Disability Compensation Benefits, and he has not returned to work since that date, due to this injury.

6. Mr. Foltice's Workers' Compensation payment is $372.00 every four weeks.

7. At all relevant times, Mr. Foltice was a member of Local 732 of the Brotherhood of Painters and Allied Trades, AFL-CIO ("Union").

II. UNION CONTRACTS

8. At no time did Guardsman inform Mr. Foltice that he was eligible to apply for pension benefits when he was 70 years-six months old.

9. At all times relevant to this matter, Guardsman was a party to collective bargaining agreements with the Union. A copy of the current collective bargaining agreement between the Union and Guardsman is attached as Exhibit A.

10. The pension benefits that Mr. Foltice seeks in this litigation were negotiated as part of his total compensation package, pursuant to the collective bargaining agreements between the Union and Guardsman.

11. Mr. Foltice has never been terminated by Guardsman, and he still appears on the Union seniority list as an individual with a "long-term disability."

III. MR. FOLTICE'S APPLICATION FOR RETIREMENT BENEFITS.

12. On November 11, 1992, Peter Foltice filed a Benefit Election Form seeking his Normal Retirement Benefit, pursuant to the Plan. A copy of this document is attached as Exhibit B.

13. Pursuant to the terms of the Benefit Election Form, Mr. Foltice elected "Option B," which would pay

him $400.52 a month for the balance of his life, and $200.26 per month to his spouse for the balance of her life, if he pre-deceased her.

14. At the time that Mr. Foltice completed his Benefit Election Form, Mr. Foltice was receiving $429.00 per month as a Workers' Compensation Disability benefit.

15. Guardsman informed Mr. Foltice that, since his Workers' Disability Compensation benefit was greater than his pension benefit under Option B, he was not entitled to a pension benefit at this time. *See*, § V, below.

16. Guardsman further determined that any Workers' Compensation payments that Mr. Foltice received would be offset against his pension benefits in the future. If, in the future, Mr. Foltice's Workers' Compensation payments were less than the amount that he was entitled to receive under the Pension Plan, he would receive the difference as a pension benefit. *See*, correspondence dated October 13, 1992, attached as Exhibit C.

IV. THE ERISA PLAN DOCUMENT AND SUMMARY PLAN DESCRIPTION

17. At all times relevant to this matter, Guardsman sponsored and administered the Guardsman Products, Inc. Bargaining Employees' Retirement Income Plan, which was an Employee Pension Benefit Plan as that term is utilized in § III(2)(A) of ERISA, 29 U.S.C. § 1002 (the "Plan"). A copy of the Plan, and its applicable amendments, are attached hereto as Exhibit D.

18. Pursuant to the terms of the Plan and ERISA, since Mr. Foltice's employment was not terminated, he

was qualified to receive any appropriate Normal Retirement Benefits on April 1, 1990, which is the first day of April following the date that he attained the age of seventy years-six months.

19. Paragraph 4.1 of the Plan states as follows:

Normal Retirement Benefit:

> Normal Retirement Benefits shall be payable to a Participant, who has made proper application therefore, on the first day of the month after such Participant becomes eligible for such benefits and shall be payable on the first day of each month thereafter during the life of such Participant.

See, Exhibit D, p. 18.

20. Paragraph 4.6 A. of the Plan states as follows:

Benefit Commencement

A. Commencement Date Limitation

> Notwithstanding Sections 4.1, 4.2, 4.3, 4.4, and 4.5, benefits shall commence no sooner than four months following the first application for benefits. If such date is later than the date specified in Sections 4.1, 4.2, 4.3, 4.4, and 4.5 the first payment shall be retroactive to the first of the month following the date the Participant became eligible for such benefit or the date of a termination of employment whichever is later, with no adjustment for interest.

See, Exhibit D, p. 20.

21. Paragraph 4.7B of the Plan states as follows:

> Notwithstanding the foregoing provisions of this Article IV, no benefits shall be payable under the Plan:
>
> * * *
>
> B. With respect to any month for which the Participant is receiving accident or sickness benefits under any plan to which the Company has contributed, but with pro-rata benefits with respect to any month for which the Participant receives sickness and accident benefits for part of the month.

See, Exhibit D, p. 21-22.

22. It is the position of Guardsman that the phrase "accident or sickness benefits," as utilized in Paragraph 4.7B, above, includes Workers' Disability Compensation Benefits. *See*, Exhibit C, p. 2.

23. At least eight times in the Plan, Guardsman utilized the words "Worker's Compensation Benefits" when they were referring to Workers' Compensation Benefit issues. *See*, Exhibit D, ¶ 1.19B. (p. 4), 3.4 (p. 11), 3.6A. (p. 14), 3.6B.1 (p. 15) Section 8.1 (April 14, 1988 Amendment, p. 3, at end of Ex. D).

24. Under ERISA and the Plan, an employee, whose employment has not been terminated, and who is still either working or on Workers' Disability Compensation, is eligible for Pension Benefits, without termination, when he or she reaches the age of seventy (70) years, six months.

25. Paragraph 9.3 of the Plan establishes the powers of the Pension Committee. Paragraph 9.3 expressly states that:

> Powers of the Committee
>
> The Committee shall have such powers as are necessary for proper administration of the Plan, including the following:
>
> B. To make all determinations as to the right of any person to a benefit. Any denial by the Committee of the claim for benefits under the Plan by a Participant or beneficiary shall be stated in writing by the Committee and delivered or mailed to the Participant or beneficiary; and such notice shall set forth the specific reasons for the denial, written to the best of the Committee's ability in a manner that may be understood by the Participant without legal or actuarial counsel. In addition, the Committee shall afford a reasonable opportunity to any Participant or beneficiary whose claim for benefits has been denied for a review of the decision denying the claim;
>
> * * *
>
> The Committee shall have no power to add to or subtract from or to modify any of the terms of the Plan nor to change or add to any benefit provided by the Plan nor to waive or fail to apply any requirements of eligibility for a benefit under this Plan.

See, Exhibit D, p. 38.

26. Guardsman provided Summary Plan Descriptions to its employees. A copy of the Summary Plan

Description is attached as Exhibit E. The Summary Plan Description contains the following terms:

> 10. *CAN I LOOSE ANY OF MY BENEFITS FROM THE PLAN?*
>
> * * *
>
> *Limitation* – Benefits are not paid for periods during which you are receiving sickness and accident benefits from a Company-sponsored plan or workers compensation benefits.

See, Exhibit E, p. 10.

> 26. Plan Documents:
>
> This booklet is a summary of your pension plan documents. We have tried to write this summary in clear, understandable and informal language. Please refer to the official plan documents for more extensive information. IN THE EVENT OF ANY CONFLICT BETWEEN THIS BOOKLET AND THE PLAN DOCUMENTS, THE PLAN DOCUMENTS WILL GOVERN.

See, Exhibit E, p. 15.

27. The Limitation in the Plan document (¶ 4.7B) is not the same language as the Limitation language in the summary plan description. (¶ 10).

V. THE REVIEW AND DENIAL OF PETER FOLTICE'S PENSION BENEFITS CLAIM

28. When Peter Foltice requested his Normal Pension Benefits, the Wyatt Company were consultants and actuaries for the Plan.

29. When Mr. Foltice made a decision to seek his pension benefits from the Plan, he spoke with R.C. Chesnover, Human Resources Director for Guardsman. During that conversation, Mr. Chesnover informed Mr. Foltice that his Workers' Compensation Benefits would be set-off against any pension benefits that Mr. Foltice was entitled to receive under the Plan. A copy of the correspondence written by Mr. Chesnover confirming the conversation, and forwarding to Mr. Foltice Section 4.7B of the Plan, is attached hereto as Exhibit F.

30. On or about October 5, 1992, Themis J. Fotieo, counsel for Mr. Foltice, wrote a letter to Robert Chesnover regarding Mr. Foltice's claim. A copy of this correspondence is attached hereto as Exhibit G.

31. On October 13, 1992, Vern P. Saper, counsel for Guardsman, responded to Mr. Fotieo's correspondence of October 5, 1992. A copy of this correspondence is attached hereto as Exhibit C.

32. In Mr. Saper's correspondence (Exhibit C) he relies upon "Article 4.7B," and states that:

> This Plan has been interpreted to include workers compensation as an "accident or sickness benefit." Employees have been advised of this by way of p. 10 of the Summary Plan Description which expressly states that no pension benefit will be paid during any period an accident or sickness benefit, including workers compensation, is received. Although the Plan provision and the SPD can be read to provide no pension benefit will be payable during a month when workers compensation is received, the provision has been interpreted as providing an

offset, rather than a complete elimination of the pension benefit.

33. In discovery in this matter, Plaintiff's counsel requested that Guardsman

> Produce all minutes of any meetings of the Pension Committee in which the Pension Committee was requested or required to interpret the plan language 'accident or sickness benefits' as that term is utilized in ¶ 4.7 of the Subject Plan when an individual was receiving Workers' Disability Compensation Benefits.

34. Guardsman did not produce any documents in response to that Request for Production of Documents.

35. On or about October 16, 1992, the Wyatt Company wrote to Mr. Robert Chesnover at Guardsman Products regarding Mr. Foltice and other claims for benefits. The correspondence stated:

> The purpose of this letter is to review the off-set and required beginning date (age 70½) and benefits for employees receiving Workers' Compensation who are over age sixty-five (65).
>
> The Plan will be rewritten, and in the meantime interpreted, to provide that pension payments will be off-set by company paid benefits.

See, Exhibit H, p. 1.

36. Additionally, on October 16, 1992, the Wyatt Company wrote to Mr. Robert Chesnover specifically about Mr. Foltice. In that correspondence, the Wyatt Company stated:

> Mr. Foltice's benefit should have commenced on April 1, 1990, his required beginning date under

> the law. This date is the April 1, following his age 70, seventy and three quarters [sic].

See, Exhibit I.

37. Also on October 16, 1992, attorney Fotieo forwarded to attorney Saper another request for information and determination as to Mr. Foltice's claim. A copy of this correspondence is attached hereto as Exhibit J.

38. On October 27, 1992, attorney Saper responded to attorney Fotieo's correspondence dated October 16, 1992. Attorney Saper forwarded the benefit election form (Exhibit A attached to these Stipulated Facts) along with his correspondence dated October 27, 1992. He also forwarded a copy of the Summary Plan Description (Exhibit E to these Stipulated Facts). Mr. Foltice completed the Benefit Election Form, and submitted it to Guardsman. A copy of this correspondence is attached hereto as Exhibit K.

39. On November 12, 1992, attorney Fotieo forwarded additional correspondence to attorney Saper regarding Mr. Foltice's Application for Pension Benefits. A copy of this correspondence is attached hereto as Exhibit L.

40. When Mr. Fotieo did not receive a response to his correspondence dated November 12, 1992, he forwarded additional correspondence to attorney Saper on December 18, 1992. A copy of that correspondence is attached hereto as Exhibit M.

41. On December 22, 1992, attorney Saper's partner, F. William McKee forwarded correspondence to attorney

Fotieo. A copy of this correspondence is attached hereto as Exhibit N.

42. In attorney McKee's correspondence dated December 22, 1992, Mr. McKee stated as follows:

> Recognizing that you and your client want the Plan interpreted differently, I suspect that you will be tempted to rush off and file suit upon receipt of this letter. Before you do so, however, consider the following: Under the Plan in question, Guardsman is vested with discretionary authority to determine eligibility and to construe the terms of the plan documents. This is significant, because it allows Guardsman a reasonable degree of leeway in how it interprets the Plan. The issue is not whether your client's interpretation of the plan is reasonable or whether there is a more reasonable interpretation of the plan. Under the controlling authority of the United States Supreme Court, the issue is whether Guardsman's interpretation of the Plan is so unreasonable as to constitute an abuse of its discretion. We continue to believe that there has been no abuse of Guardsman's discretion and that its interpretation of the plan is fair, reasonable, and legally justifiable.

See, Exhibit N, p. 1-2.

43. In February of 1993, Guardsman restated, but has not adopted, the Pension Plan. The parties agree, however, that this restated Plan does not affect the issues raised in this litigation. A copy of this document was forwarded to counsel for Mr. Foltice by attorney McKee, along with correspondence dated March 19, 1993. Mr. McKee did not forward the entire revised Plan, but only

the section dealing with the powers of the Plan Committee. A copy of this correspondence, and the revised Plan language, is attached as Exhibit O.

44. Pursuant to this restated Plan, dated February, 1993, the powers of the Plan Committee now reads as follows:

> A. The Plan Committee shall have such duties and powers as it may deem necessary or appropriate to discharge its duties including, but not by way of limitation, the following:
>
> > 1. To construe and interpret the Plan, decide all questions of eligibility, and determine the amount, manner and time of payment of any benefits;
> >
> > * * *
>
> B. The Plan Committee shall have the power and duty to do all things necessary or convenient to effect the intent and purpose of the Plan and, not inconsistent with any of the provisions thereof, whether or not such powers and duties are specifically set forth in the Plan, and, not in limitation but in amplification of the foregoing, shall have the discretionary authority and the power to construe and interpret the Plan, to determine the eligibility for benefits of a Participant or any other person filing a claim under the Plan, to determine the amount of benefit payable to a Participant or other recipient, and to determine all questions that shall arise under the Plan, including particularly, directions to and questions submitted by any person on all matters necessary for it to discharge properly its power and duties. Decisions of the Plan Committee made in good faith upon any matters

> within the scope of its authority shall be final and binding on the Employer, the Trustee, Participants, Beneficiaries of deceased Participants, and all others. The Plan Committee, at all times, in making and carrying out its decisions and directions, shall act in a uniform and non-discriminatory manner and may, from time to time, prescribe and modify uniform rules of interpretation and administration.

See, Exhibit O, p. 11.5-11.6.

45. In discovery, Plaintiff requested that Guardsman

> Produce all documents that were reviewed by the Plan Administrator or the Plan Review Committee, in any way, in connection with Peter Foltice's claim for the employee benefits at issue in this litigation, except for the documents attached to the Complaint. If it is your position that any of the documents attached to the Complaint are not complete copies of that document, provide complete copies of any such document also.

46. The documents produced by Guardsman in response to this Production of Document Request are attached hereto as Exhibit P.

47. Any denial by the Pension Committee of a claim must be stated in writing by the Committee and delivered by mail to the Participant. *See*, Exhibit D, Paragraph 9.3B, p. 38. No such correspondence has ever been written by the Pension Committee to Peter Foltice.

48. There are no minutes reflecting that the Pension Committee reviewed Peter Foltice's claim.

49. There are no minutes reflecting that the Pension Committee has ever interpreted the Plan language "accident or sickness benefits" as that term is utilized in ¶ 4.7 of the Plan when an individual was receiving Workers' Disability Compensation benefits.

50. If Mr. Foltice is successful in securing his entire pension benefit, without an off-set for Workers' Disability Compensation benefits received by him, the payments would be due and payable as of April 1, 1990, in the amount of $400.52 per month, with a survival benefit to his wife of $200.26 per month after Mr. Foltice's death, if he predeceases his spouse.

51. Mr. Foltice has exhausted all of his administrative remedies under the Plan documents.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Peter Foltice

Date: 3/1, 1994

By: /s/ Mark S. Allard
Mark S. Allard (P-38164)

Business Address:
The Bridgewater Place
P.O. Box 352
Grand Rapids, Michigan
49501-0352
(616) 336-6000

WARNER, NORCROSS & JUDD
Attorneys for Guardsman Products, Inc., et al

Date:
3/1, 1994

By: /s/ Mark S. Allard w/ authorization by telephone on 3/1/94 at 1:55 p.m.
Scott J. Gorsline (P44094)

Business Address:
900 Old Kent Bank Building
111 Lyon Street, N.W.
Grand Rapids, MI 49503-2489
(616) 459-6121

[Exhibits Omitted In Printing]

CONTINGENT FEE AGREEMENT

The undersigned, Peter Foltice, does hereby retain Varnum, Riddering, Schmidt & Howlett, as attorneys, to institute, prosecute or adjust such claims or actions as may be deemed advisable by said attorneys, to recover damages resulting from a denial of pension benefits by the Guardsman Products, Inc., Bargaining Employees' Retirement Income Plan and other damages arising out of this denial of benefits.

In consideration of the services rendered and to be rendered, the undersigned agrees to pay said attorneys upon a contingent basis, as attorneys' fees, $165.00 per hour to $215.00 per hour, depending on the individual attorney working on the file, plus the hourly rates for other individuals employed by Varnum, Riddering, Schmidt & Howlett to work on this file, including paralegals whose rates begin at $75.00 per hour. Varnum, Riddering, Schmidt & Howlett agrees to accept as its attorneys' fees any award from the United States District Court for the Western District of Michigan, Southern Division, for attorneys' fees rendered pursuant to ERISA. The undersigned will be obligated to pay attorneys' fees, based upon the hourly basis identified herein, if this matter should settle without the necessity of a trial, and without the Court, therefore, awarding attorneys' fees to Varnum, Riddering, Schmidt & Howlett.

The undersigned has been advised that attorneys may be employed under other fee arrangements whereby the attorney is compensated for the reasonable value of his services, such as on an hourly or per diem basis.

The undersigned hereby gives said attorneys the right to take all legal steps to enforce said claims and the undersigned agrees not to settle said claims in any manner without first notifying Varnum, Riddering, Schmidt & Howlett so as to receive their advice on the proposed settlement.

The undersigned hereby agrees to pay all disbursements reasonably necessary to the proper performance of said legal services, the payment of said disbursements not being contingent upon the outcome of the case.

The undersigned hereby gives said attorneys a lien on said claims and causes of action, and on the funds realized by settlement or recovered by judgment, as security for the payment of said fees (if the case is settled without the Court granting attorney fees) and such disbursements as may be advanced by Varnum, Riddering, Schmidt & Howlett.

The undersigned further agrees that this contingency fee shall be only for attorney services through trial, and shall not include attorney services for any appeal after trial.

The undersigned understands and agrees that no result or recovery has been guaranteed by Varnum, Riddering, Schmidt & Howlett.

The undersigned hereby acknowledges receipt of a copy of this Contingent Fee Agreement.

Dated: 10-25-93

WITNESSES:

/s/ Dawn E. Kelly _____ /s/ Peter Fotice L.S.

_____ _____ L.S.